149 U.S. 17

RECORD, CASE No. 13,768.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 179.

GUSTAVUS BOGK, PLAINTIFF IN ERROR,

vs.

HARRY GASSERT, JACOB REDING, AND JAMES H. STEELE.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED OCTOBER 14, 1889.

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INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from district court	1	1
Complaint	1	1
Answer	4	2
Replication	7	4
Defendant's bill of exceptions No. 1	9	4
Defendant's bill of exceptions No. 2	11	5
Exhibit A—Deed from Gustavus Bogk *et ux.* to James H. Steele, May 19, 1885	12	5
B—Deed from Gustavus Bogk *et ux.* to Harry Gassert and Jacob Redding, May 19, 1885	16	7
C—Agreement between Harry Gassert and Jacob Redding and James H. Steele, May 19, 1885	20	9
D—Lease from Harry Gassert *et al.* to Gustavus Bogk, May 21, 1885	23	10

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 1, 1892.

	Original	Print.
Testimony of Thomas M. Lowry	25	11
Joseph A. Hyde	26	11
James H. Steele	27	12
Henry Gassert	27	12
Motion for nonsuit	29	13
Judge's certificate to bill of exceptions	30	13
Indorsement of time of filing statement on appeal	31	13
Notice of filing statement on appeal	32	13
Indorsement of time of filing amendments to statement on appeal	33	14
Notice of filing amendments to statement on appeal	34	14
Notice of presentment of statement on appeal and amendments for settlement	35	14
Engrossed statement on appeal	37	15
Statement of plaintiffs' offerings	37	15
Evidence for defendant	39	16
Testimony of John H. Curtis	39	16
Thos. M. Lowry	40	17
Patrick A. Largy	40	17
John A. Laggat	40	17
John M. Steward	40	17
Bryan Irvine	41	17
Joseph A. Hyde	41	18
Gustavus Bogk	44	19
Defendant's Exhibit 8—Statement of account	50	22
Evidence for plaintiffs in rebuttal	56	25
Testimony of James H. Steele	56	25
Harry Gassert	58	26
Instructions given at request of plaintiffs	62	28
Instructions given at request of defendant	66	30
Instructions asked by defendant refused	69	32
Verdict	72	33
Judgment	73	33
Notice of appeal	76	35
Undertaking on appeal	77	35
Assignment of errors in law by defendant	79	36
Judge's certificate to statement on appeal	81	37
Transcript of E. A. Nichols, justice of the peace	82	37
Undertaking of defendant on transmission to district court	84	38
Clerk's certificate	86	39
Opinion	88	40
Order that missing record be replaced	103	48
Order fixing amount of supersedeas bond	105	49
Bond	106	49
Citation	108	50
Writ of error	110	51
Acknowledgment of service of writ of error, citation, and bond	111	51
Affidavit of value	112	52
Clerk's certificate	113	52

a In the Supreme Court of the Territory of Montana, January Term.

HARRY GASSERT, JACOB READING, and JAMES H. STEELE, Plaintiffs & Respondents,
v.
GUSTAVUS BOGK, Defendant & Appellant.

Transcript on Appeal.

Appeal from the district court of the second judicial district in and for the county of Silver Bow.

Appearances: For respondents, S. De Wolfe, Esquire, William H. De Witt, Esquire; for appellant, E. W. Toole, Esquire, John T. Baldwin, Esquire.

Filed this 2nd day of February, 1889.

R. L. WORD, *Clerk.*

1 In the Justice Court in and for Silver Bow Township & County, Montana Territory.

Before W. I. Lippincott, justice of the peace.

HARRY GASSERT, JACOB READING, and JAMES H. STEELE, Plaintiffs,
v.
GUSTAVUS BOGK, Defendant.
} Complaint.

The plaintiffs above named complain of the defendant and allege—

That plaintiffs, by a written lease made and entered into with defendant, dated on the 21st of May, 1885, leased, demised, and let to the defendant for the term of one year from the date of said lease the following-described premises, to wit: The north twenty-one feet and three inches of lot No. five (5), in block 21, in the city of Butte, according to the official plat and survey of said city, together with all the improvements thereon, being the buildings and improvements formerly known as the Virginia chop-house (now called the Revere house); and, by the lease aforesaid, did also lease, demise, and let, for a like term, the following-named mining claims, situate in the Summit Valley mining district, Silver Bow county, Montana Territory, namely, the Berlin, Margaritha, Gustavus, Eva,
2 and Leaf Lode mining claims, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any manner appertaining.

The defendant, by the terms of said lease, agreed to pay for the use of the premises for the term mentioned the sum of four hundred and fifty dollars, payable on or before December 1st, 1885, and on the expiration of the term to surrender and deliver up the

premises to the lessors (these plaintiffs) or their assigns in like state as received, the wear and tear thereof from use and damages from the elements alone excepted.

That since the term of said lease defendant has contined to hold and occupy said property; that the term of said lease and for which the premises mentioned were let to the defendant expired on the 21st day of May, 1886, and said defendant holds over and continues in possession of said premises after the termination of the time for which they were demised or let to defendant and against the wish and consent of plaintiffs.

That plaintiffs since the expiration of the term for which said premises were let to defendant, to wit, on the 24th day of May, 1886, made demand in writing of the defendant to deliver up the possession of said leased premises to plaintiffs; that more than three days have elapsed since said demand of possession was made, notwithstanding which the defendant has neglected and refused and still neglects and refuses to surrender and deliver to plaintiffs the possession of said premises, contrary to the form of the statute in such case made and provided.

That the monthly value of the rents and profits of said premises is five hundred ($500) dollars.

3 Wherefore plaintiffs pray judgment against defendant for the restitution of the premises mentioned and for damages for the detention thereof at the rate of five hundred dollars per month since the 21st day of May, 1886, together with judgement for costs.

(Sig.) S. DE WOLFE,
Att'y for Pl'ffs.

(Verified by James H. Steele.)

Endorsed: Filed May 28th, '86. (Sig.) W. I. Lippincott, justice peace. Filed June 4th, 1886. (Sig.) E. A. Nichols, J. P. Filed June 9th, '86. R. L. Davis, clerk, by (sig.) Charles S. Warren, deputy clerk.

4 In the Justice Court in and for the Township and County of Silver Bow, Montana Territory.

Title of Cause.

Answer.

Now comes the above-named defendant, and for answer to plaintiffs' complaint on file herein—

Denies that plaintiffs, by a written or other lease made and entered into with defendant, dated on the 21st of May, 1885, or at any other time, leased, demised, or let to defendant for the term of one year or for any other term the premises described in plaintiffs' complaint or any other premises except as hereinafter set forth and specified.

Denies that defendant without right or unlawfully hold-over or

continue- in possession of the premises described in plaintiffs' complaint or any part thereof.

Denies that plaintiffs were or ever were possessed or that they are now or ever were entitled to the possession of the premises described in plaintiffs' complaint or any part thereof.

Further answering, defendant affirmatively alleges—

That on the 19th day of May, 1885, and for a long time prior thereto defendant was and has ever since been and is now the owner and in possession and entitled to possession of the property described in plaintiffs' complaint and every part and parcel thereof.

That on said 19th day of May, 1885, defendant and
5 his wife executed and delivered to plaintiffs' a deed conveying to plaintiffs' all the premises described in plaintiffs' complaint, which said deed was absolute upon its face.

That said deed was made and delivered and intended by defendant and understood and accepted by plaintiffs as a mortgage to secure the payment of the sum of seventeen thousand nine hundred and twenty dollars ($17,920.00), which said sum was owing from defendant to plaintiffs and was payable on the 29th day of May, 1886; that at the date of the execution of said deed plaintiffs agreed in writing with defendant that all of said property should be reconveyed to defendant upon the payment by defendant to plaintiffs of said sum of $17,920.00.

That plaintiffs by said deed did not acquire title in fee to said property, but only a mortgagee's lien thereon, and it was so understood between said parties.

That afterwards, to wit, on the 21st day of May, 1885, and in connection with and as a part and parcel of the transaction hereinbefore set forth, defendant did enter into a certain agreement in writing with plaintiffs in the form of a lease of said premises for plaintiffs to defendant for one year from said date for the consideration therein named of four hundred and fifty dollars ($450.00).

That said sum of $450.00 was the amount computed by said parties and was so understood between them that would be necessary to pay the taxes upon said property and the annual assessment
work upon said mining property during the term of said
6 mortgage.

That said instrument alleged to be a lease was made, accepted, and understood between the parties thereto as a security that said defendant should pay said sum of $450.00 and save said plaintiffs harmless therefrom, and that upon the payment thereof by defendant the object of said lease should be fully satisfied and discharged.

That defendant has paid said sum of $450.00 and saved said plaintiffs harmless from all payments as above set forth, and that said lease thereupon became void and of no binding force.

Wherefore defendant asks to be sent hence with his costs.

(Sig.) SHARP & NAPTON,
Att'ys for Defendants.

(Duly verified.)

Endorsed: Filed June 2nd, 1886. (Sig.) W. I. Lippincott, justice peace. Filed June 4th, 1886. (Sig.) E. A. Nichols, J. P. Filed June 9th, 1886. R. L. Davis, clerk, by (sig.) Charles S. Warren, deputy clerk.

7 *Replication.*

Second Judicial District Court, Silver Bow County, Montana.

Title of Cause.

The plaintiffs, by leave of court first had and obtained, for replication to defendant's answer—

Deny that at any time since May 21st, 1886, defendant has been the owner or entitled to the possession of the premises in controversy or any part thereof.

Deny that the deed described in the answer was made, delivered, or intended by defendant or understood or accepted by plaintiffs as a mortgage, as alleged in the answer, but was an absolute deed.

Allege that plaintiffs did acquire an absolute fee-simple title by said deed and not a mortgage lien, nor was it so understood by the parties.

That the lease mentioned in said answer was not a part and parcel of said deed, but was a separate instrument, and was so understood by the parties.

That the amount of $450.00 mentioned in the answer was and was intended to be rent for said premises under said lease; that said lease was not intended as a security, as alleged in the answer, nor was it made, accepted, or understood as such by the parties, but was intended as a lease, as appears upon the face thereof.

Wherefore plaintiffs demand judgement as asked for in the complaint.

(Sig.) S. DE WOLFE,
Plaintiffs' Attorney.

(Verified by S. De Wolfe.)

8 Endorsed: Filed Sept. 20, 1886. R. L. Davis, clerk, by (sig.) Charles S. Warren, deputy clerk.

9 *Defendant's Bill of Exceptions Number One.*

Title of Court and Cause.

The above cause being on trial the 16th day of October, 1886, one of the days of the September term, 1886, of the above-named court, the evidence being closed, the defendant requested the court to give to the jury certain instructions submitted and filed and numbered 1 to 12, inclusive, and the court refused to give three of said instructions, to wit, those numbered 2, 6, and 7; to which action of the court the defendant then and there objected for the reason that said instructions numbered 2, 6, and 7 correctly state the law as applicable to the facts in evidence and are necessary in order that the

jury may arrive at a correct conclusion, but, notwithstanding said objection, the court refused to give said instructions 2, 6, and 7; to which action the defendant, by his council, duly excepted and asks that this his bill of exceptions be signed, which is accordingly done this 16th day of October and before the case is submitted to the jury.

And, furthermore, the plaintiffs requested the court to give the jury certain instructions, which they submitted and filed and numbered 1 to 7, inclusive, and the defendant objected to the giving each, every, and all of said instructions because the same do not correctly state the law as applicable to the facts in evidence and issues in this case and tend to mislead and prejudice the jury to the injury of the defendant, but, notwithstanding said objections, the
10 court gives said instructions, and to this action of the court the defendant then and there, by his council, duly excepted and ask- that this his bill of exceptions be —, which is done this 16th day of October, 1886, before the case is submitted to the jury.

(Sig.) WM. J. GALBRAITH, *Judge.*

Endorsed: Filed Oct. 16th, 1886. (Sig.) R. L. Davis, clerk.

11 *Defendant's Bill of Exceptions Number Two.*

Title of Court and Cause.

Be it remembered that the issue in the above-entitled action came on for trial before the district court aforesaid, at its regular September term, 1886, on the 14th day of October, A. D. 1886.

A jury was called, sworn, and duly empaneled to try said case, and the plaintiffs, by their council, opened the case. The pl-intiffs then, to maintain the issues upon their part, offered and read in evidence a bargain and sale deed, duly acknowledged and executed, marked "Exhibit A," dated May 19th, 1885, from Gustavus Bogk and Margaret Bogk, his wife, to James H. Steele, one of the plaintiffs herein, for an undivided one-half (½) of the demanded premises particularly described in the complaint filed in this action.

12 EXHIBIT "A."

This indenture, made the 19th day of May, A. D. eighteen hundred eighty-five (1885), between Gustavus Bogk, and Margaret Bogk, his wife, parties of the first part, and James H. Steele, party of the second part, all of Silver Bow county, Montana Territory, witnesseth:

That said parties of the first part, for and in consideration of seven thousand five hundred dollars ($7,500.00) to them in hand paid by the party of the second part, the receipt of which is acknowledged before the sealing and delivery of these presents, have granted, bargained and sold, and do by these presents grant, bargain, sell and convey unto said party of the second part, and to his heirs and assigns forever, an undivided one-half interest in and to the following-described property, to wit: An undivided half interest in and to the Berlin Lode mining claim, described in the United States patent

as mineral entry number 722, and as lot No. 98, embracing a portion of section 7, in township 3 north, of range 7 west of the principal meridian, and containing seventeen and $\frac{43}{100}$ acres of land, more or less.

Also an undivided half interest in and to the Margaritha lode and mining claim, located on the 23rd day of July, 1881, and recorded in Book A of Lode Locations, page 479, in the records of Silver Bow county.

Also, an undivided one-half interest in and to the Gustavus lode and mining claim, located August 12th, 1880, and recorded in Book L of Lode Locations, page 408, records of Deer Lodge county.

13 Also an undivided one-half interest in and to the Eva lode and mining claim, located February 9th, 1882, and recorded in Book B of Lode Locations, page 128, records of Silver Bow county.

Also an undivided one-half interest in and to the Leaf lode and mining claim, lying west of the Lynchburg and north of the Margaritha lode and mining claim.

All of the above-named lodes and mining claims lying and being situate in Summit Valley mining district, Silver Bow county, Montana Territory.

Also an undivided one-half interest in and to the following-described part of lot No. five (5), in block No. twenty-nine (29), of the city of Butte, according to the official plat and survey of said city, on file in the office of the county clerk and recorder of Deer Lodge county M. T. Beginning at the northeast corner of said lot five (5), and, running thence along the east line of said lot, twenty-one feet three inches, more or less, to the center of the brick wall at the east end thereof, of the building standing on said lot and known as the "Virginia chop-house;" thence, along the middle of said brick wall, sixty-four and one-half (64½) feet, more or less, to the stone sill of the window next to the east of the door in the first story of said b-ilding; thence, south, seven and one-half (7½) feet; thence, west, twenty-seven and one-half feet, more or less, to the west bound-ry line of said lot; thence north along said bound-ry line, twenty-eight and one-half (28½) feet, more or less, to the northwest corner of said lot; thence, east along the north bound-ry line of

14 said lot, ninety-two (92) feet, more or less, to the northeast corner of said lot, the place of beginning.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any manner appertaining to each of said above-described pieces or parcels of land; and all the metals and ores, and metal-bearing rock and earth contained therein; and all the estate, right, title, interest, claim, possession and deman- of said parties of the first part of, in and to the said premises, and each and every part and parcel thereof;

To have and to hold the same, with the appurtenances, unto said party of the second part, his heirs and assigns forever.

In witness whereof, said parties of the first part have hereunto set their hands and seals, on the day and year first above written.

(Sig.) GUSTAVUS BOGK. [SEAL.]
(Sig.) MARGARITHA BOGK. [SEAL.]

Duly acknowledged before—

JAMES W. FORBIS,
Notary Public.

Filed for record May 21st, 1885, at 20 minutes past 4 o'clock p. m.

15 The plaintiffs also offered and read in evidence another bargain-and-sale deed duly acknowledged and executed, marked "Exhibit B," dated May 19th, 1885, from Gustavus Bogk and Margaret Bogk, his wife, to Harry Gassert and Jacob Redding, two of the plaintiffs in this action, for an undivided one-half ($\frac{1}{2}$) of the demanded premises particularly described in the complaint herein:

16 EXHIBIT "B."

This indenture, made the 19th day of May, A. D. eighteen hundred eighty-five (1885), between Gustavus Bogk and Margaret Bogk, his wife, parties of the first part, and Harry Gassert and Jacob Redding, parties of the second part, all of Silver Bow county, Montana Territory, witnesseth:

That said parties of the first part, for and in consideration of seven thousand five hundred dollars ($7,500) to them in hand paid by the parties of the second part, the receipt of which is acknowledged before the sealing and delivery of these presents, have granted, bargained and sold, and do by these presents grant, bargain, sell and convey unto said parties of the second part, and to their heirs and assigns forever, an undivided one-half interest in and to the following-described property, to wit:

An undivided half interest in and to the Berlin Lode mining claim, described in the United States patent as mineral entry number 722, and as lot No. 98, embracing a portion of section 7, in township 3 north, of range 7 west of the principal meridian, and containing seventeen and $\frac{43}{100}$ acres of land, more or less.

Also, an undivided one-half interest in and to the Margaritha lode and mining claim, located on the 23rd day of July, 1881 and recorded in Book A of Lode Locations, page 497, in the records of Silver Bow county.

Also, an undivided one-half interest in and to the Gustavus lode and mining claim, located August 12th, 1880, and recorded in
17 Book L of Lode Locations, page 408, records of Deer Lodge county.

Also, an undivided one-half interest in and to the Eva lode and mining claim, located February 9th, 1882, and recorded in Book B of Lode Locations, page 128, records of Silver Bow county.

Also, an undivided one-half interest in and to the Leaf lode and mining claim, lying west of the Lynchburg and north of the Margaritha lode and mining claim.

All of the above-named lodes and mining claims lying and being situate in Summit Valley mining district, Silver Bow county, Montana Territory.

Also, an undivided one-half interest in and to the following-described part of lot No. five (5), in block No. twenty-nine (29), of the city of Butte, according to the official plat and survey of said city, on file in the office of the county clerk and recorder of Deer Lodge county, M. T.: Beginning at the northeast corner of said lot five (5), and, running thence along the east line of said lot twenty-one feet three inches, more or less, to the center of the brick wall at the east end thereof, of the building standing on said lot, and known as the "Virginia chop-house;" thence, along the middle of said brick wall, sixty-four and one-half (64½) feet, more or less, to the stone sill of the window next to and east of the door in the first story of said building; thence, south, seven and one-half (7½) feet; thence, west, twenty-seven and one-half feet, more or less, to the west boundary line of said lot; thence, north, along said boundary line, twenty-eight and one-half (28½) feet, more or less, to the north-
18 west corner of said lot; thence, east, along the north boundary of said lot, ninety-two (92) feet, more or less, to the northeast corner of said lot, the place of beginning.

Together with all *the* singular *and* tenements, hereditaments and appurtenances thereunto belonging, or in any manner appertaining to each of said above-described pieces or parcels of land; and all the metals and ores, and metal-bearing rock and earth contained therein; and all the estate, right, title, interest, claim, possession and demand of said parties of the first part, of, in and to said premises, and each and every part and parcel thereof;

To have and to hold the same, with the appurtenances, unto said parties of the second part, their heirs and assigns forever.

In witness whereof, said parties of the first part have hereunto set their hands and seals, on the day and year first above written.

(Sig.) GUSTAVUS BOGK. [SEAL.]
(Sig.) MARGARITHA BOGK. [SEAL.]

(Duly acknowledged before—

JAMES W. FORBIS,
Notary Public.)

Filed for record May 21st, 1885, at 25 minutes past 4 o'clock p. m.

19 Then the plaintiffs also offered and read in evidence a memorandum of agreement under seal, duly acknowledged and executed, marked "Exhibit C," dated May 19th, 1885, from Harry Gassert, Jacob Redding, and James H. Steele, the plaintiffs herein, to Gustavus Bogk, the defendant herein, wherein and hereby the said plaintiffs covenanted and agreed with the said defendant that they (the plaintiffs) would resell and reconvey to him (the defendant) the same demanded premises in the complaint herein and in said deeds and memorandum of agreement particularly described, provided said Gustavus Bogk, the defendant, shall on or before the 19th day of May, 1886, pay or cause to be paid to said plaintiffs the total sum of $17,935.00, or the sum of $8,967.50 to James H. Steele, one of said plaintiffs, and the further sum of

$8,967.50 to Harry Gassert and Jacob Redding, two of said plaintiffs, agregating the first sum last above mentioned.

20 EXHIBIT "C."

Agreement.

Memorandum of agreement entered into at Butte City, Montana Territory, on the nineteenth day of May, 1885, between Harry Gassert and Jacob Redding, parties of the first part, James H. Steele, party of the second part, and Gustavus Bogk, party of the third part, all of Silver Bow county, Montana Territory, witnesseth:

Whereas, the said Gustavus Bogk and Margaritha Bogk, his wife, have this day sold and by deed conveyed to said first and second parties, in consideration of seven thousand five hundred dollars respectively paid by said first and second parties, an undivided one-half interest each in and to the north twenty-one feet three inches of lot number five (5), in block No. 29, in the city of Butte, according to the official plat and survey of said city, and a like undivided one-half interest each in and to the following mining lode claims, situate and lying in Summit Valley district, Silver Bow county, Montana Territory, to wit: The Berlin, Margaritha, Gustavus, Eva and Leaf Lode claims, reference being made to the deed mentioned for a fuller description of said property; and whereas, the said Gustavus Bosk is desirous of having the right to repurchase said property within one year from the date of this agreement—

21 Now, *this* consideration of the premises, and one dollar by him paid to said first and second parties, the receipt of which said last-named parties do severally hereby acknowledge, said first and second parties do hereby covenant and agree to resell and reconvey to said third party the undivided one-half interest in and to the above-described property severally sold and conveyed to said parties by the said Gustavus Bogk and wife, provided said third party shall, on or before the nineteenth day of May, 1886, pay or cause to be paid to said first party the sum of $8,967.50, and shall pay or cause to be paid to the said second parties a like sum of of $8,967.50, on or before the said last-named date.

In witness whereof, said first parties, by their attorney-in-fact, Henry Jacobs, and said second party in person, do hereunto set their hands and seals, on the day and year herein first above written.

(Signed) HARRY GASSERT, [SEAL.]
By HENRY JACOBS,
His Attorney-in-Fact.

(Signed) JACOB REDING, [SEAL.]
By HENRY JACOBS,
His Attorney-in-Fact.

(Signed) JAMES H. STEELE. [SEAL.]

(Duly acknowledged and recorded in Silver Bow county, Montana.)

Filed for record May 21st, 1885, at 30 minutes past 4 o'clock p. m.

22 Both of said deeds and said memorandum of agreement were admitted and read in evidence.

The plaintiffs then offered in evidence the alleged written lease mentioned in the pleadings herein, ma-ked "Exhibit D," dated May 21st, 1885, from all the plaintiffs herein to the defendant herein, whereby the plaintiffs undertook, covenanted, and agreed to let, lease, and demise to the defendant the same and identical premises in the complaint and foregoing deeds and memorandum of agreement described for the term of one year from and after the 21st day of May, 1885, the date thereof, for and in consideration of the sum of $450.00, to be paid to them by the defendant on or before the first day of December, 1885.

23 EXHIBIT "D."

This agreement of lease, entered into at Butte City, M. T., on the 21st day of May, eighteen hundred eighty-five, between Harry Gassert, Jacob Reding and James H. Steele, hereafter called the lessors, and Gustavus Bogk, hereafter called the lessee, witnesseth:

That said lessors, for and in consideration of four hundred and fifty dollars, to be paid by said lessee as hereafter mentioned, do, by these presents, lease, demise and let, to said lessee, for the term of one year from the date thereof, until the 21st day of May A. D., 1886, the north twenty-one feet and three inches of lot No. five (5), in block No. 21, in the city of Butte, according to the official plat and survey of said city, on file in the office of the county clerk and recorder of Deer Lodge county, Montana Territory, together with all improvements thereon: being the building and improvements commonly known as the "Virginia chop-house."

Also, do lease, demise and let, for a like term, the following quartz lode mining claims, lying and situate in the Summit Valley mining district, Silver Bow county, Montana Territory, to wit: The Berlin, Margaritha, Gustavus, Eva, and Leaf Lode mining claims.

Together with all *the* singular the tenements, hereditaments and appurtenances thereunto belonging, or in any manner appertaining, with the right and privilege of mining and extracting ores thereupon, and converting the same or the product derrived therefrom to his own use.

24 In consideration whereof, said lessee does promise and agree to pay for the use of the premises for the term mentioned, the sum of four hundred and fifty dollars, payable on or before December first, 1885; and at the expiration of the term, to surrender and deliver up the premises to the lessors, or their assigns, in like state as received, and wear and tear thereof arising from use, and damage arising from the elements, alone excepted.

In witness whereof the said parties do hereunto sign their names, on the day and year in this lease first written.

(Signed) HARRY GASSET,
By HENRY JACOBS,
His Attorney-in-Fact.

(Signed) JACOB REIDING,
By HENRY JACOBS,
His Attorney-in-Fact.

(Signed) JAMES H. STEELE.

(Signed) G. BOGK.

25 To the introduction in evidence of said alleged lease the defendant, by his council, objected for the reason it was incompetent, irrelevant, and immaterial; but the court overruled said objection of the defendant and admitted said lease in evidence, and it was read to the jury; to which ruling of the court said defendant, by his council, then and there duly excepted, and asked that this his bill of exceptions be signed, which is accordingly done.

The plaintiffs then called THOMAS M. LOWRY, who, being first duly sworn, testified as follows:

I reside in Butte City; have lived here about ten years or a little over. I know how some of the property rents on Main street, between Clark & Larabie's bank down to Mr. Hyde's building. I have been in business in that block. I know where the building is formerly known as the Virginia chop-house and now called the Revere house; I know it is three stories and a basement, and know something about the rental values of property on that block; I do not know the number of rooms; have heard only. From my knowledge of the rental value on that block I should think the monthly rental value of the Revere house, the entire building, estimating by the rental value of other property on the same block, would be about $450.00 or $500.00; I would think that would be reasonable, considering other rents.

On cross-examination said witness testified as follows:

I think it would be reasonably worth between $450.00 and
26 $500.00; I should think $450.00 would be low; $500.00 might be a trifle high; I think it would be worth at least $475.00 by the month, monthly.

The plaintiffs then called JOSEPH A. HYDE, who, being first duly sworn, testified as follows:

I reside in Butte, and have lived here nine years. I am, to some extent, familiar with the rental value of property on the west side of Main street, between Clark & Larabie's bank, and the brick building on the corner owned by me. I know where the building known as the Revere house is; I know about the building itself. From my knowledge of that building and my knowledge of the rental value of other property on the same block, I should think that the monthly rental value of that building would be $500.00.

On cross-examination said witness testified as follows:

I am letting the Lizzie block, in that vicinity. I think the Revere house ought to rent by the year at the rate of $500.00 per month. I think it ought to rent for five hundred dollars per month, the way other property rents there. I can only judge from the time I leased my building there. Of course I knew nothing of the rental value before that. I made most of my agreements in June and July of last year; my building was not delivered until about December last; my estimate is during the period from July, 1885, up to the present time; I should judge it would be of the same rental value from May 1st, 1885, to the present time. I think $500.00 is a fair estimate of the rental value, and has been since the first of May, 1885.

27 The plaintiffs then called JAMES H. STEELE, who, being first duly sworn, testified as follows:

I am one of the plaintiffs in this action. I am the grantee in the deed read to the jury from Bogk and wife to James H. Steele, of an undivided one-half (½) of that property mentioned there; that is my signature also to that contract to reconvey, and that it my signature also to that lease. I was present when that was signed; G. Bogk, the defendant, signed it. I have not been in the possession of this property at any time since the expiration of this lease to Bogk. I know where the property called the Revere house is situated. I think I know something about the rental values of property on that block, perhaps not as close as some others. From what I know of the rental value of property on that block, I should think that $500.00 would be a fair monthly rental value of the property known as the Revere house.

On cross-examination said witness testified as follows:

I am partially familiar with the rental values there; I obtained my information from what I learned other property was renting for; I presume it has been worth that sum for the last year; I think that is a fair estimate of the rental value from April, 1885, up to the present time, covering the last year and a half; I have not been in possession of the property.

Redirect examination:

Since the expiration of the lease, I have not been in possession of this property.

The plaintiffs then called HENRY GASSERT, who, being first duly sworn, testified as follows:

28 I am one of the plaintiffs in this action; I am the same Gassert mentioned in that deed that was read to the jury; I have not, since the 21st day of May last, been in actual possession of any of the property mentioned in those deeds and the lease; the defendant has not held this property since the twenty-first day of

May last by my consent, or that of any of my associates; he has held it against our consent.

The plaintiffs here rested, and the defendant moved for and filed in writing his motion for a nonsuit upon the grounds therein stated and set forth.

29 *Motion for Nonsuit.*

Title of Court and Cause.

Now comes the defendant in the above-entitled action and moves the court that the plaintiffs be nonsuited in this action for the reason that the evidence introduced by them in this action fails to prove their cause of action in this:

They failed to prove that they were ever at any time in or entitled to the possession of the premises described in the complaint, and that defendant ever entered into possession under and by virtue of said lease or referable thereto, and that the *defendants* totally failed to prove a demand to have been made for the possession of said premises by them or any one upon the def't, and that they, pl'ffs, ever at any time served or gave notice to quit and deliver possession of same on the def't or caused it to be done at any time or at all.

(Signed) JOHN T. BALDWIN,
Att'y for Def.

Endorsed: Filed Oct. 14th, 1886. (Signed) R. L. Davis, clerk.

30 But the court overruled the defendant's said motion for no-suit; to which ruling of the court the defendant, by his counsel, then and there duly excepted, and asked the court to allow and sign this his bill of exceptions, which is accordingly done.

This bill of exceptions is settled and allowed in open court on this 22nd day of October, 1886, in accordance with the stipulation and agreement of the parties made in open court.

(Signed) WM. J. GALBRAITH, *Judge.*

Endorsed: Filed Oct. 22nd, 1886. (Signed) R. L. Davis, clerk.

31 Indorsement of time of filing statement on appeal:

Filed Nov. 5th, 1886. R. L. Davis, clerk, by (signed) Charles S. Warren, deputy clerk.

32 *Notice of Filing Statement of Appeal.*

Title of Court and Cause.

Please take notice that the defendant in the above-entitled action has and did on the 5th day of November, 1886 (and within twenty days after the entry of the judgment in said cause), filed in

the office of the clerk of the said district court his statement on appeal in said action.

Dated Nov. 5th, 1886.

(Signed) JOHN T. BALDWIN,
Att'y for Def't.

We hereby admit due service of the above notice to have been made on us this 5th day of Nov., A. D. 1886, and waive a copy thereof and a copy of the statement on appeal.

(Signed) S. DE WOLFE,
(Signed) W. H. DE WITT,
Att'ys for Plaintiffs.

Endorsed: Filed Nov. 5th, 1886. R. L. Davis, clerk, by (signed) Charles S. Warren, deputy clerk.

33 Indorsement of time of filing amendments to statement on appeal:

Filed Nov. 9th, 1886. R. L. Davis, clerk, by (signed) H. S. Clark, deputy clerk.

34 *Notice of Filing Amendments to Statement on Appeal.*

Title of Court and Cause.

To John T. Baldwin, attorney for defendant.

SIR: Please take notice that the pl'ffs in the above-entitled cause did on this 9th day of November, 1886, file in the office of the clerk of the above-named court their amendments to the statement on appeal in the above case filed by the defendant on the 5th day of November, 1886.

Respectfully,

(Signed) WILLIAM H. DE WITT,
Of Council for Plaintiffs.

Due and timely service of the above notice upon me this 9th day of November, 1886, is admitted and copy waived.

(Signed) JOHN T. BALDWIN,
Defendant's Attorney.

Endorsed: Filed Nov. 9th, 1886. R. L. Davis, clerk. (Signed) H. S. Clark, deputy clerk.

35 *Notice of Presentment of Statement on Appeal and Amendments Thereto to Judge for Settlement.*

Title of Court *for* Cause.

To S. De Wolfe and Wm. H. De Witt, Esqu'r's, attorneys for plaintiffs.

SIRS: Please take notice that the proposed statement of the defendant herein on his appeal to the supreme court of Montana Ter-

ritory from the judgment *from* the above-entitled action, made and entered in the district court on the 16th day of October, A. D. 1886, in favor of the plaintiffs in said action and against the defendant therein, and the plaintiffs' amendments to said statement will be presented to the judge of said district court for settlement by him on the 8th day of December, 1886, at 11 o'clock a. m., or as soon thereafter as *council* can be heard, at his chambers, in the court-house, at the town or city of Deer Lodge, Deer Lodge county, Montana Territory.

(Signed) JOHN T. BALDWIN,
Att'y for Def't.

Due and timely service of the foregoing notice upon us this 4th day of December, 1886, is admitted and a copy thereof waived.

(Signed) S. DE WOLFE,
(Signed) WILLIAM H. DE WITT,
Att'ys for Plaintiffs.

36 Endorsed: Filed December 6th, 1886. R. L. Davis, clerk, by (signed) Charles S. Warren, deputy clerk.

37 *Engrossed Statement on Appeal.*

Title of Court and Cause.

The issues in the above-entitled action came on for trial before the district court aforesaid, at its regular September term, 1886, on the 4th day of October, A. D. 1886, and said trial was commenced—*i. e.*, submitted to a jury, and its verdict was found and returned on the 16th day of October, 1886.

On the 14th day of October, 1886, a jury was called, sworn, and duly empaneled to try said cause, and the plaintiffs, by their *council*, opened the case.

The plaintiffs then, to maintain the issues upon their part, offered and read in evidence a bargain and sale deed, being duly acknowledged and executed, marked "Exhibit A," dated May 19th, 1885, from Gustavus Bogk, defendant, and Margaret Bogk, his wife, to James H. Steele, one of the plaintiffs herein, for an undivided one-half of the demanded premises particularly described in the complaint filed in this action. (See pages 12, 13, and 14 of this transcript for a full copy of said deed.)

The plaintiffs also then offered and read in evidence another bargain and sale deed, duly acknowledged and executed, marked "Exhibit B," dated May 19th, 1885, from Gustavus Bogk, defendant, and Margaret Bogk, his wife, to Harry Gassert and Jacob Reding, two of the plaintiffs in this action, for an undivided one-half ($\frac{1}{2}$) of the demanded premises particularly described in the complaint herein. (See pages 16, 17, and 18 of this transcript for a full copy of said deed.)

38 Then the plaintiffs also offered and read in evidence a memorandum of agreeement under seal, duly acknowledged

and executed, marked "Exhibit C," dated May 19th, 1885, from Harry Gassert, Jacob Reding, and James H. Steele, the plaintiffs herein, to Gustavus Bogk, the defendant herein. (See pages 20 and 21 of this transcript for a full copy of said memorandum of agreement.)

Both of said deeds and memorandum of agreement were admitted and read in evidence.

The plaintiffs then offered in evidence the alleged written lease mentioned in the pleadings herein, marked "Exhibit D," dated May 21st, 1885, from all the plaintiffs herein to the defendant herein. (See pages 23 and 24 of this transcript for a full copy of said lease.)

To the introduction in evidence of the said alleged lease the defendant, by his *council*, then and there objected for the reason that it was incompetent, immaterial, and irrelevant, but the court overruled said objection of the defendant and admitted said lease in evidence and it was read to the jury; to which ruling of the court said defendant, by his *council*, then and there duly excepted.

The plaintiffs then called Thomas M. Lowry, who, being first duly sworn, testified as follows: (For the testimony of said Lowry see page 25 of this transcript, beginning at line No. 10 down to and including line No. 2 on page 26.)

The plaintiffs then called Jos. A. Hyde, who, being first duly sworn, testified as follows: (The testimony of said Hyde commences at line 5 on page 26 of this transcript and includes all to line 30, same page.)

39 The plaintiffs then called James H. Steele, who, being first duly sworn, testified as follows: (For the testimony of said Steele see page 27 of this transcript, beginning at line 3 down to and including line 28 of same page.)

The plaintiffs then called Harry Gassert, who, being first duly sworn, testified as follows: (The testimony of said Gassert commences with line 1 on page 28 of this transcript and extends down to and includes line 8 of page 28.)

The plaintiffs did not offer or introduce any other or further evidence-in-chief, but here rested their case.

Whereupon the defendant, by his *council*, moved for and filed in writing his motion for a nonsuit, which was in the words and figures following: (See page 29 of this transcript for said motion for nonsuit.)

The court overruled the defendant's said motion for nonsuit; to which ruling of the court the defendant, by his *council*, then and there duly excepted.

The defendant then, to maintain the issues on his part, called his witnesses and introduced in evidence the *parcel* and documentary evidence following:

JOHN H. CURTIS, being called and sworn, testified that he was acquainted with the values of real estate in the city and in the block in which the Revere house was situated, and that the Revere house and lot was now and has been for 18 months last past reasonable worth the sum of $18,000.00, and that he was a real-estate agent and dealer and would give that sum for it.

40 THOS. M. LOWRY, being called and sworn, testified that he was somewhat acquainted with the values of real property in the block where the Revere house was situated; he had occupied and de-lt in property in that block; that the Revere house and lot was now and had been ever since the first day of May, 1885, reasonably worth the sum of $25,000.00.

PATRICK A. LARGY, being called, testified that he was familiar with the values of real estate in the block in which the Revere house was situated; that said house and lot was now and had been since the first day of May, 1885, reasonably worth the sum of $22,000.00.

JOHN A. LAGGAT, being called and sworn, testified that he knew the location of Mr. Bogk's mining claims; that he was familiar with the value of the five claims described in the complaint in this action, the Berlin, Gustavus, Margaretha, Leaf, and Eva Lode mining claims; that he had examined the same when trying to buy them about 18 months ago, and that said claims, in his opinion, were now and had been for 18 months last past reasonably worth the sum of $30,000.00; and the witness further testified that he did not know of any actual offer ever having been made for the said mining claims.

JOHN M. STEWARD, being called and sworn, testified that he was familiar with the prices of mining properties in this Summit Valley mining district and knew about the locations of the five mining claims described in the complaint herein; that they were situated in a good locality, and that he considered them reasonable worth at least about $22,000.00; that he was a practical miner
41 and had been mining, dealing in, and handling mines in this camp or district about eleven years last past.

BRYAN IRVINE, being called and sworn, testified that he was now and had been mining in the Summit Valley mining district for years, and was familiar with the values of mining properties in said district; that he was familiar with the location and quality of the five mining claims described in the complaint in this action, and that they were in a good locality; that, in his opinion, they were now, and had been since April, 1885, reasonably worth the sum of $25,000.

The defendant here introduced in evidence several location notices, patents of the U. S. to def't, final receipts of the U. S. Land Office, which were marked "Exhibits 1 to 7," inclusive, for the purpose of showing the area of said five mining claims, and that three of them had been patented, as tending to show the value thereof.

Whereupon to save the reading thereof *council* for plaintiffs admitted that three of said mining claims were patented, and that the aggregate area thereof was about and in excess of eighty acres.

After said admission was made the exhibits last aforesaid were, by the consent of *council* for both parties, withdrawn from the evidence.

JOSEPH A. HYDE, called by defendant, testified: I am cashier of the First National bank, and have occupied that position for the last 4 and a half years. I am acquainted with the parties to this action—plaintiffs and defendant. I was called on to compute some interest for them; I don't remember the exact amount I com-
42 puted the interest on; I believe it was Mr. Steele alone that I made the computation for; that is my recollection of it; it was about the 19th day of May, 1885; I know because I had been talking to Mr. Steele about building a house; I know it was somewhere about that time, and they commenced work on the house the 10th of May, 1885, and it was along in there somewhere; I can only remember that in connection with the building; I think it was about that time. They asked me to figure on a certain number of thousand dollars at one and a half per cent. per month, is my recollection, payable monthly, and when I made the computation I figured it on $1,000 and multiplied it by the number of thousands in order to save work. My recollection is that the rate was 1 and ½ per cent. per month, and that the interest was to be paid monthly—that is, I compounded the interest; it was compounded monthly, with monthly rests. The considerations of these two deeds together would make $15,000.00; the consideration of this contract to reconvey seems to be the same; it names $8,967.50 for one undivided half, and I think you will find the like amount for the other half; yes, sir, making $17,935.00. Figuring the rate of interest at 1 & ½ per cent., with monthly rests, for one year on the amount of the consideration of these two deeds ($15.000.00), I think it would amount to about that much money. To compound monthly rests it would take some time to figure it, but I ran over it yesterday, and without compounding the interest on the monthly payments of interest I made it $17,000.00; it would amount to $17,100.00; figuring it a
43 short method, I made it $17,922.75. To figure it accurately it would be necessary to figure the interest on the monthly payments of interest; my recollection is that this is the way it was to be figured, by monthly rests and interest on interest; that bond would be about correct; that would be within 8 or 10 dollars of it; it may be absolutely correct. Figuring the interest on $15,000.00 in that way, it would produce very nearly the same amount named in the bond.

By Mr. DE WOLFE: "We don't deny that the amount fixed in the bond was based on that original amount of $15,000 and interest for one year."

Whomever I made the computation for I made it for alone; Mr. Steele, I think, was the gentleman who asked me, and I believe I afterwards talked about it to Mr. Gassert, but I never spoke about it, to my recollection, to Mr. Bogk at all. I was in the bank when I was asked to make this computation, and when I spoke to the other party about it it was on the street, or they spoke to me about it; it was directly in front of Gamer's; I think they had been sitting on some beer kegs in front of Gamer's saloon. I don't remember about Bogk being there; he may have been. I don't remember

positively whether it was Gassert or Steele I spoke to in front of Gamer's. The interest was compounded monthly; there was nothing said about it being paid except that I was to compute the interest for one year, compounding it monthly.

Cross-examination:

I am not able to fix the exact date of this conversation; it is the event of talking to Mr. Steele about that time in relation to
44 building the Lizzie bloack that fixes the fact in my memory; this conversation may have occurred a week or ten days before the date of these deeds; we commenced to build the Lizzie block about the 10th of May. The person who asked me to make the computation was alone; I don't think he told me what he wanted to do with the amount—just asked me to make the computation. When I was spoken to about this matter in front of Gamer's it appears to me it was Gassert; he spoke about is as I went along, and I remember that I asked him if he had anything to do with that, and he said yes, and I told him I didn't know it, and if Mr. Bogk was there he will remember, probably; I don't remember the date of that conversation, but it was after I had made this computation, but I didn't know at that time that Gassert had anything to do with it, or, in fact, that Bogk had.

GUSTAVUS BOGK, being called and sworn, testified:

I am the defendant in this action. On the "Berlin" lode is a tunnel which I made 6 or 7 years ago, about 400 feet, and a shaft 115 feet and a cross-cut 170 feet. I cross-cut the vein; the vein is 70 feet from wall to wall, only it is in five streaks of ore; the veins are from 3 to 5 feet wide, none less than 3 feet. Down below, a 100 feet at the cross-cut, timbered clear down, too much water drove me out; I couldn't stand it, and I didn't want no partners. There is about 200 tons of ore on the ground from the tunnel and shaft; and then there is another shaft 54 feet deep with a vein 4 feet wide; and then there is a cross-cut on another vein which shows from grass-roots 36 feet wide; that is another vein. It is just about 50
45 or 60 feet from the vein where I sunk that shaft and where I got a whim-house. I had assays from $7.00 up to $300.00 from this shaft. There is ruby silver and chloride—some ruby silver. That is in the shaft where the whim-house is, which is 115 feet deep. I have had assays out of the other shaft of from 20 up to 50 ounces in silver to the ton. These shafts are two compartment shafts, all of them, and all timbered and lined on the inside. The inside is 8 x 3½ inside the timbers. The inside of the ground is about 5 x 9. Both shafts are the same size. Besides the shaft-house there are cross-cuts on that claim; then there is another shaft sunk about 30 feet, but not timbered; shows a vein about 4 or five feet wide on one side of the shaft. I got assays from there.

(Plaintiffs moved the court to strike out the testimony of this witness as to assays obtained. Motion sustained, and defendant excepts.)

There is a shaft-house and a whim-house on the "Berlin." It is a shaft-house with a gallows frame, where I worked it with a whim, and then a blacksmith's shop attached to it, and another little building where my men stopped—a shanty.

On the "Margaretha" claim there is a hall 48 x 98; the saloon part is 24 x 48, the hall is 36 x 60, and four side rooms alongside the hall, and in the rear a kitchen and dining-room. There are two shafts on it, one 54 feet, timbered, and another 100 feet deep (double compartment shafts), and shaft-house on it the same size as on the "Berlin."

46 On the "Gustavus" claim is a shaft; this one shaft stands in the center of the line between the "Margaretha" and the "Gustavus;" and then there is a tunnel which I have run on purpose for water, about 75 feet long, and got a stream of water of two to four inches.

There is a shaft on the "Leaf" lode between 35 and 40 feet, timbered, and on the "Eva" a shaft about 35 feet deep and timbered and cross-cut besides; only representing work on them two little holes 10 to 12 feet deep.

On all the claims, wherever I sunk a shaft, is a lead from 3 to 5 feet wide, the whole width of the shaft. The value of these improvements on these claims, what they are reasonably worth, is no less than $25,000.00, the improvements including all the shafts, buildings, tunnels, &c.

Q. Have you had any offers to purchase or to enter into a contract *of* purchase this property within the last two years?

(Objected to as incompetent. Objection sustained, and defendant excepts.)

I didn't have any offers to buy, except those under bond—these bonds which they had give—what Leggat offered me and the California companies. I have had no offers outright except forfeitures, not particular, except under bonds. I never had no offers—regular big offers—only that which John Leggat made. This was no bond of Leggat's. He offered me a $1,000.00 down, and if this California company don't take it he would give me $29,000.00 more. This was not a written instrument with Leggat.

Q. I will ask you if this fact, that you were under contract
47 . at the time of this negotiation with Leggat to sell these mines to somebody else, made you refuse the offer of Leggat's.

(Objected to by plaintiffs. Objection sustained. Defendants excepts.)

I am familiar with the values of mining claims out in the vicinity of these five claims *on* mine. I am familiar with the situation of these claims; they are pretty near all in one piece—four in one piece of land—and the "Berlin" lies a little southwest from these; they are in a good locality; all the claims which are opened there are pretty good, southwest and north. These five claims, including the improvements, are actually worth at this time—all the improvements I made and what show there is for ore there—$50,000.00.

They had been of that value over two years, and up to the present time I don't consider that there has been any change in the value.

A year ago last May I applied to these plaintiffs to obtain some money from them. I made a bargain with these parties for 1 and ½ per cent. I applied to these parties for a loan, not a sale; that wasn't the question first. I went to them and wanted money to pay off these other parties what I owed. First, I spoke to Harry Gasser, I believe, or to Steele (I forget now; my memory is a little short). The first I asked them for money. I was foreclosed to pay off this foreclosure—and Harry Gassert he only asked me one per cent., and then when Steele stepped in, or when they went together, they wanted 1 and ½, but it should have been made in a deed with a bond to me for a deed back again to me. I wanted it for a year to
48 pay off these parties and give them a mortgage for it; that was the first agreement. I didn't know exactly at the time what amount it would take to clear all the property. I wanted as much as it would amount to at the time. I went to these parties for money to pay off my debts; Steele, I guess, I spoke to, and the money should be on a mortgage first. I wanted that money on a mortgage, and when these other parties stepped in they came to me and say, We want a deed, and we give you a bond for a deed back again so you can release it—pay it off any time. Steele and Harry Gassert said this to me; said, We want a deed, but we will give you a bond to convey back at any time. The agreement as to the interest was 1 and ½ per cent.; that I was to pay 1 and ½ per cent. I was to have the money for one year. The way it figured up it amounted to $15,000.00; the interest was to be paid monthly; the agreement was that it should be paid monthly—not monthly in advance—monthly for each month at the end of the month. Joe Hyde figured up the interest on this amount, $15,000.00. I was right present at an interview that occurred between Joe Hyde and these plaintiffs; the parties could not exactly agree about this compound interest, and one of these parties said, We will either go to Joe Hyde or Ross Clark to figure up this compound interest. So we went down, me and De Wolfe, and, I believe, it was Harry Gassert or Steele, I don't know which now, and we met Hyde on the sidewalk, and, I believe, it was De Wolfe asked Hyde about this compound interest, to figure it up. I think it was De Wolfe; don't recollect exactly whether it was De Wolfe or Steele. There was three of us
49 together went down and met Hyde a little this side of Schmidt & Gamer's. I don't remember when this interview was; I guess it was about two or three days before the execution of these deeds. Hyde computed the interest and gave it to these gentlemen—I don't know to which one of them it was. I was never present with Steele when he interviewed him in the bank—when he interviewed him about figuring the interest. He figured the interest at that time at 1½ per cent. per month on $15,000.00. I received only a little over $700.00 of it; the balance was paid over to parties where there was any mortgage or anything against me on the house or mines. I believe De Wolfe did all the paying out. De Wolfe furnished me a statement of how this was done. De

Waolfe was acting for us both, for Steele and Gassert and myself, as their agent and attorney and mine; this was the only statement I got, and it was furnished by De Wolfe. This $15,000.00 was applied according to that statement rendered me by De Wolfe. I recognize that as a memorandum furnished me by De Wolfe of the application of that $15,000.00; I did not know how much I did owe. De Wolfe gave me this statement; he paid all these parties; all I got out of that $15,000.00 was $741.71.

The said statement in writing was here introduced in evidence and marked Defendant's "Exhibit 8."

(The defendant here introduced and read in evidence the statement of account rendered def't by De Wolfe and marked "Exhibit 8:")

50 DEFENDANT'S EXHIBIT "8."

Statement of Account Between Messrs. Gassert & Reding and J. H. Steele and G. Bogk.

Totale amount paid Mr. Bogk as follows:		$15,000 00
John P. Shoning, judgment	$9,378 00	
Butte Hardware Co.	1,542 44	
Smoke-house title	840 00	
J. H. Steele	112 95	
Gassert & Reding, mortgage	1,050 00	
Forbis Bros., insurance	99 55	
George F. Marsh, do.	205 00	
E. J. Sutton	92 75	
Montana Lumber Co.	675 00	
S. De Wolfe	50 00	
Balance paid G. Bogk	714 71	
		$15,000 00

51 Referring to the statement, I find that there was paid to Forbis Bros. $99.55, insurance money, and to Geo. F. Marsh $205, insurance money. These premiums were paid on the Revere house and on the hall out in the garden, on both properties. They were paid at about the same time as this transaction. The insurance was paid before these papers or any of them were delivered to me and just about the same time—it might be a day before; they were premiums on policies of insurance for one year. These policies began to run from about the date of that transaction. Prior to the negotiation of this transaction I was indebted to Harry Gassert. I had a loan from him, or rather from Gassert & Reding, of $1,000.00, which was secured by a chattel mortgage on my furniture, and that mortgage was taken off the furniture and charged to me in this statement and was merged in here. At the time of the negotiation of this loan I promised to repay the $15,000.00 to the plaintiffs just as soon as I made a sale of my mines. I had these mines so that I thought I could make a sale of them, and calculated to pay it that way; I promised to pay it inside of a year. The interest was put

altogether for a year, but I agreed to pay this interest every month, but through my sickness and bad luck I had I could not succeed and could not pay it. The agreement was this way: If I should pay the interest they should give me a written paper and credit for the amount, if it was paid in instalments as agreed between us. This lease, which was read in evidence, was made to secure the representation of two of my mining claims, the Eva and Leaf,
52 which were then unpatented, and to secure the payment of the taxes on my property, which would probably be $250.00, and $200.00 for representing, making in all $450.00 which this lease was given to secure and nothing else; which representation work I did for that year, 1885, and I have paid the taxes. The taxes were paid by Jacobs or De Wolfe—I don't know which—and afterwards they came to me and said: Here, you have got to pay your taxes. I was pretty hard up that winter and had the saloon leased to Van Gundy and Miller, and I gave an order on them to De Wolfe for half of the amount of the taxes, and also gave Jacobs and order on them for the other half of said taxes. Jacobs acted for Gassert and Reding, and Steele was sick at the time and De Wolfe acted for him, and Van Gundy and Miller paid the orders. I gave these orders in two equal amounts because De Wolfe and Jacobs wanted it so done, and the two together amounted to something over $250.00. These orders were drawn about three months after the first of December, 1885; I think it was in March, 1886; I know it was done before the first of May, 1886. The whole amount of the orders was paid by my tenants, Van Gundy and Miller, and they charged the same up to me. The taxes paid became due and payable in December, 1885, and were for that year. Neither of the plaintiffs, not any one acting for them, ever made any demand for any payment of any other sum at any time, and never demanded the payment of any rent; they never demanded the other two hundred dollars mentioned in the lease; I paid that myself for the representation of the mines. They came to me about tax-paying time, I think, in December, 1885, and asked me to pay the taxes. I could not do it at
53 that time; then they paid the taxes and I paid it back to them about three months afterwards. These several papers, the two deeds, the contract to reconvey, and this lease, were all delivered at the same time. The two deeds and *to* bond to reconvey were filed for record at the same time. Pending this negotiation or before this negotiation was completed and these documents were delivered, I never had any conversation with these plaintiffs or their agents as to the price or as to the purchase of my property, either the mining claims or the Revere house and lot. There was nothing at all said in these interviews between me and the plaintiffs or their agents or attorneys as to the sale of my property. They said, give them a deed and they would give me a bond for a deed back again. The negotiation between us was to loan me money. There was no price set to any piece or pieces of this property. It was a loan on all the property together. They made me no proposition pending these negotiations to purchase my property, to buy it of me.

Cross-examination by DE WOLFE:

I remember coming to your office with Gassert and Steele a few days before these papers were drawn up. I don't remember exactly how long that was before. I don't remember what I said to you at the time I came to your office, nor what Steele or Gassert said at that time. These papers here—the deeds, this bond, and this lease—I recollect very well. The lease was made on purpose for the representation and the taxes, those $450,000, because he asked me particularly how much would be the taxes, and I told him it
54 would probably be over $200.00 this year. When we came to your office Gassert did not say to you, in my presence, and I did not assent to this proposition: "Gassert did not say to you, we have purchased Bogk's property." He did not say that. It might be he said, "We have agreed that he may repurchase it of us again in twelve months' time by the payment of so much money," but I don't recollect it. I don't remember that Gassert asked you if that would be a legal transaction and if you could put it in form. I don't remember of your having any such conversation with Gassert. I don't remember of your turning to me and asking me if this was my agreement with them. I don't remember of your telling me right at that time that this was a case in which if I did not repurchase this property and pay the price the property would belong absolutely to these gentlemen; nothing of the sort; nothing of that kind. I did not understand it that way. At the close of this conversation, after the terms of the agreement had been talked about, I might have told you that I could pay $5,000.00 on that property before the time expired for my repurchase, and I could easily enough handle it after that, because I had expectation that I could sell the mine. I then expected to get that money. I was in your office several times with these gentlemen. When these deeds and this contract were drawn up they were all read carefully to me, and the nature of them was talked about, I think. I came there with them and you represented us all in drawing these papers. I remember of requesting you to go and examine the records and see what incumbrances were upon the Revere house, and to see the records
55 of this court, and see if there were any judgement liens. I think you had to go up there and make the property clear. That is what I wanted you for. There was something said at the time in regard to the payment of interest. I gave no note to these parties on account of indebtedness. I agreed to pay them whenever I got it. I guess something like that. I agreed to refund and repay the money they advanced me in a year. That is what the bond says, to pay it back in a year.

The lease was spoken of for security—just to secure the representation on the mining claims and payment of the taxes. I don't recollect any conversation that I was to have the Revere house free from rent for one year or for a mere nominal rent. This $15,000.00 was turned over to you and you paid it out, and you afterwards gave that statement to me. I instructed you to pay that money on my debts; all these items set forth in the statement were

paid by you on my account and by my instructions, and the whole of those items, including the seven hundred and odd dollars I got, amounted to $15,000.00. I testified that the value of these mining claims was $50,000.00. I have recently offered by an advertisement, offered a half interest in all these mining claims and also a half interest in the Revere house for the sum of $20,000.00 and have not found a purchaser at that price so far.

Redirect examination:

I put that advertisement in the paper a little over a week ago—about 10 or 12 days since; the purpose was on account of this indebtedness; I wanted to raise the money to pay these parties off.

Defendant rests.

56 *Testimony of Plaintiffs in Rebuttal.*

JAMES H. STEELE testified as follows:

You (witness here referring to and addressing Mr. De Wolfe, one of the plaintiffs' counsel) prepared these papers, deeds and contracts; they were prepared in your office; Gassert, myself, and Bogk came there together.

Q. Did any conversation take place in the office in regard to the agreement that had been made between you, Gassert, and Bogk?

Defendant, by his counsel, objected to the foregoing question being answered for the reason that it would elicit incompetent, immaterial, and irrelevant testimony; which objection was by the court overruled and defendant then and there duly excepted to the said ruling of the court.

Ans. We explained so that you might understand how we wanted these papers drawn up. In the first place, I think it was Gassert who opened the conversation; in fact, I know it was. His first question, if I remember correctly, was—he asked you in the presence of all if you could make out a deed for this property, that we had bought it, an absolute deed, and have it lawful and you said that you could, and then we talked of the agreement; that if Bogk paid us so much money in a year we would give him an agreement back for the sale of the property in one year; that was the sum and substance, and you turned to me and Bogk asked if that was the understanding; we said it was and you said you could draw it that way and make it lawful and binding on both parties. Bogk had made some kick about the thing and we talked there probably a half
57 an hour before it was all understood with all parties. The whole matter was talked over there in your office between us parties. Bogk wanted to give us a mortgage, and we told him that we would not have any such dealing with him; that we would buy his property directly out and no other way; that was in the office. He wanted to give us a mortgage on the property for that amount of money or for an amount of money—I don't remember whether it was

the amount we gave in here or not. Bogk does not owe me anything; he does not owe me a cent. There was no agreement, obligation, note, or anything of the kind for the payment of money received. There was no agreement at the time made to Gassert and me to pay any interest to us. After the deed and the contract to reconvey in a year was completed there was a lease drawn by you (witness here referring to and addressing Mr. De Wolfe, one of plaintiff's council) for the nominal sum of $1.00. A day or two after this we thought it was fair for us that the taxes should be paid on this property providing Bogk repurchased the property in one year and without we made some arrangement for it it would come out of our own pocket and the representing of the two claims, and we went to your office the second time and talked this over, and Bogk agreed to give us so much money providing he rebought it, so we made out a new lease covering money enough to pay the taxes and represent these two claims, and Bogk signed it, and it was agreeable to all parties.

The defendant moved the court to strike out the testimony of the witness, Jas. H. Steele, given in rebuttal, for the reason that
58 said testimony is incompetent, irrelevant, and immaterial; which motion the court overruled, and the def't then and there duly excepted to the said ruling of the court upon said motion.

Cross-examination:

The conversations I have narrated concerning the transactions with Bogk all certainly were had prior to the execution and delivery of the two deeds—the contract to reconvey and the lease. I think that the deeds, contract, and lease were all delivered at the same time. The agreement was that he was to give us an amount equivalent to pay the taxes and do the representing, which the lease represents. I had De Wolfe collect from Bogk one-half of the taxes—my share. I never received any rent from Bogk or demanded any other than the taxes repaid to me and representation of the mining claims.

And the witness further testified:
That when he went to Mr. Jos. Hyde to calculate interests, as has been testified to by former witness, he went to have interest figured from a transaction different than the one which finally culminated in executing and passing the papers in evidence.

HARRY GASSERT called in rebuttal by plaintiffs and testified as follows:

Q. State what conversation took place at my (De Wolf's) office at the time these deeds and this contract to reconvey was made.

Objected to by council for defendant for the reason that said question would call forth and elicit incompetent, irrelevant, and immaterial testimony; which objection was by the court
59 overruled, and the defendant then and there duly excepted to said last ruling of the court.

And the witness, in answering said question, testified as follows :

Bogk, Steele, and myself were present at your office when this conversation was brought up in regard to the consummation of this business, which Bogk agreed to and we all agreed to. It was agreed that he was to sell us that property for $15,000.00.

The whole sum was summed up and put into that contract to reconvey, and we gave him a bond to this effect: that we would resell the property back to him. The amount actually advanced on this was $15,000.00; the consideration mentioned for the resale was what it would come to at 1 and ½ per cent. interest per month for one year. In addition to the $15,000.00, during this conversation, there was nothing said about a loan of money or mortgage. There had been between me and Bogk prior to this conversation. Before coming to the office of Mr. De Wolfe the understanding between Bogk and me was the same I have just stated. Prior to that he had been talking to me about loaning him money, and in fact I had loaned him money and I refused to lean him any more. I stated this proposition to him about the $15,000.00 when I came into your (the witness here referring to and addressing Mr. De Wolfe, one of the counsel for plaintiffs) office, and asked you to draw up papers to that effect. The whole subject was talked over between Steele, Bogk, and myself at the time. The whole matter was thoroughly understood by all of us and talked over and over again. Bogk has never tendered to me the money or any portion of it
60 prior to or since the 21st day of May, 1886. During this conversation at your office, before the papers were drawn up and executed, there was nothing whatever said in regard to the payment of interest on this $15,000.00 except that we computed the interest to see what it would amount to in one year. That was the basis of the proposition, to resell to him.

There was no agreement on the part of Bogk to pay any other interest. There was an agreement on his part in a certain way to repay the $15,000.00; that he had a year to repurchase, but he did not have to repay it unless he wanted to rebuy the property back. He did not agree to repay us $15,000.00 or any other sum. I have no present claim of indebtedness against Bogk in reference to this business; he owes me no money at all on this property.

I have been at one or two of the lode claims. I can't say what they are reasonably worth; they are certainly not worth much. My negotiation for this property and the price I paid for it was based almost wholly upon what I considered the value of the Revere house and the ground upon which it stands.

The defendant moved the court to strike out all the testimony of witness Harry Gassert, given in rebuttal, relating to the conversation and oral negotiations between the pl'ffs and def't at the time of and prior to the execution of the two deeds and contract to reconvey, in evidence, concerning the transaction between the parties, which culminated in the execution and delivery of said instruments,
61 for the reason that said evidence was incompetent, immaterial, and irrelevant; but the court overruled said motion, and the

defendant then and there duly excepted to said ruling of the court upon said motion.

On cross-examination the witness testified:

I have never been in possession of or exercised any acts of ownership over this property since the deeds were made except to authorize my agent, Jacobs, to pay the insurance of the ensueing year and demand possession of it.

The witness last aforesaid, on redirect examination, testified:

I have never had any opportunity at all to exercise ownership or control over it since the expiration of the lease. I am seeking to gain legal and peaceable possession of it.

On recross-examination he testified:

I have not virtually been in possession of this property at any time. I have never been in the actual possession of it at any time, nor has Steele or the other pl'ffs been in the actual possession thereof any more than myself, so far as I know.

The testimony here closed and the cause was summed up by the respective council and submitted to the jury under the instructions of the court.

Upon request of the plaintiffs the court gave the following instructions, numbered from 1 to 7, inclusive; to the giving of each, every, and all of said seven instructions the defendant then and there in writing, as appears by defendant's bill of exceptions filed, excepted before the jury retired to consider of their verdict,
62 but, notwithstanding said objection and exception, the court gave all said instructions, viz:

1.

This action is brought under the statute of forcible entry and unlawful detainer. The case of action here is alleged unlawful detaining and withholding of real property by the defendant from the plaintiffs, the plaintiffs alleging that the defendant has wrongfully withheld from them the possession of what is called the Revere house, in the city of Butte, since the 21st day of May, 1886; also certain mining claims mentioned in complaint, the plaintiffs alleging a lease from them to defendant which expired on said 21st day of May, 1886. It is admitted by the pleadings and the evidence that a lease was entered into between plaintiffs and defendant
Given. for said property, which expired on said day, but the defendant claims that said lease was such only in form and was part and parcel of some other transactions constituting a mortgage of said premises by defendant to plaintiffs. It is further admitted by the pleadings that this action was commenced in proper time and form, provided said instrument was only a lease and so intended. There is in evidence deeds of the said premises from defendant to plaintiffs, dated May 19th, 1885; also a covenant from plaintiffs to defendant of the same date, agreeing to reconvey said premises to the defendant for the sum of $17,920.00. The

defendant now claims that said deeds, covenants, and lease
63 were intended to be taken together and were intended by the parties as a mortgage by the defendant to the plaintiffs of said premises. If said several instruments were a mortgage the plaintiffs cannot recover the possession of said premises in this action; if they were not a mortgage, then plaintiffs must recover. The test as to whether said instruments were a mortgage is this: If a debt were created from defendant to plaintiffs, upon which plaintiffs could sue in debt, then the instrument may be a mortgage; if a debt were not created, then the instruments were not a mortgage, and plaintiffs must recover possession of the premises in this action.

You must, therefore, determine whether there were a debt.

Given. From the transactions in evidence can the plaintiffs sue defendant for a debt? Did defendant promise to pay the sum of $17,920.00 to plaintiffs, or did he simply have an option to pay it and demand a deed of the premises? If he (defendant) did not obligate himself to pay, then there was no mortgage; the plaintiffs must recover herein; and by the expression "creation of a debt," as used in these instructions, is meant, not a debt existing at or before the date of the transactions of May 19th and 21st, as testified to, but rather did those transactions, the *passiton* of the instruments of those dates and the surrounding circumstances, obligate the defendant to repay to the plaintiffs the consideration named in said deeds or covenant?

64 2.

Given. If you find for the plaintiffs for the possession of the property in controversy, you must also find a verdict for the rents of the premises from the 21st day of May, 1886, to the day of your verdict. This you must determine from the evidence and fix the amount at the value of the rent as proved, if any.

3.

Given. You are further instructed that if the evidence does not prove that in the giving of the deeds, lease, and contract, and by the accompanying circumstances, a debt was created from defendant to plaintiffs, as explained in the previous instructions, the question of inadequacy of consideration, the question of computation of interest, and all evidence introduced by defendant for the purpose of showing or tending to show that the transactions in evidence were intended to be a mortgage instead of a sale are utterly immaterial. The test is, was a debt created from defendant to plaintiffs; and, if it were not, then plaintiffs must recover.

4.

Given. Gross inadequacy in the price paid for property has been held by the courts as a circumstance tending to show that a mortgage was intended, and not a sale; but this is a circumstance to be considered in connection with other facts and

circumstances adduced in evidence, and is not sufficient in itself to warrant or justify construing an absolute deed as a mortgage.

65 If the jury, therefore, believe from the entire evidence offered that a sale with an agreement to reconvey was intended by the parties at the time of entering into these contracts, their verdict shall be for the plaintiffs, notwithstanding

Given. the fact that the price paid for the property was not its full value.

5.

In the present case the deeds from the defendant to the plaintiffs of the property in controversy taken alone constitute a sale and not a mortgage, and the burden of overcoming that fact, as shown by these instruments, rests upon the defendant, who claims

Given. that they were given and accepted as a mortgage only.

If the defendant has not shown by a preponderance of the evidence that these instruments, taken together and in connection with the lease offered in evidence, *was* given and intended as a mortgage at the time they were entered into your verdict should be for the plaintiffs.

6.

Mutuality enters as an ingredient in all contracts. By this is meant that both parties are reciprocally bound by the contract made. A mortgage in law is a security for the payment

Given. of a debt, and without a debt there can be no mortgage.

If you, therefore, find from the evidence that the plaintiffs paid the defendant for the property described in the complaint and took a deed absolute for the property sold and made an

66 agreement at the same time to reconvey the property to the def't, but the defendant did not agree to repurchase or pay back to plaintiffs the money paid for the property and no indebtedness or obligation exists on the part of the defendant

Given. either to purchase the property or pay back the money received therefor, the court instructs you that such a contract is a sale and not a mortgage, and your verdict, if you so find, should be *be* for the plaintiffs.

7.

In arriving at your verdict you should consider all the

Given. facts offered in evidence, and if from a survey of the entire evidence you are satisfied that a conditional sale and not a mortgage was intended your verdict should be for the plaintiffs.

The defendant requested the court to give twelve instructions, numbered from 1 to 12, inclusive; but the court refused to give three of them, viz., those numbered 2, 6, and 7, and gave only the other nine. To the ruling of the court in refusing to give said instructions 2, 6, and 7 the defendant then and there, as appears by defendant's bill of exceptions filed, excepted in writing before the retirement of the jury.

A mortgage is a mere security for the payment of money and does not convey the legal title in and to the land for any
Given. purpose, but is only a lien thereon, and it shall not be deemed a conveyance, whatever its form or terms, so as to
67 enable the owner of the mortgage to recover the possession of the land or real property mortgaged without a
Given. foreclosure and sale.

3.

If the jury believe from the evidence that the deeds from Gustavus Bogk and wife to the plaintiffs, together with the contract to reconvey the premises described therein, were made, executed, and delivered at the same time by the parties to this action and with the intention of only securing the payment of a debt, loan, or advance of money and interest thereon owing from and to
Given. be paid by the defendant to the plaintiffs, then said deeds and contract to reconvey in writing under seal, now in evidence, are, in law and effect, a mortgage, and the plaintiffs would not thereby acquire the right of or be entitled to the possession of the premises, and they could not make a valid lease or demise of said premises to the defendant.

4.

The court instructs the jury that it is not necessary or essential that the debt, loan, obligation to pay money should be evidenced by a note, bond, or any other collateral agreement in
Given. writing, not is it essential to the certain validity of a mortgage that the mortgagor should be personally liable for the payment of the debt or loan secured thereby; but it is sufficient if the land only is subjected to the satisfaction and payment thereof.

68 If the jury believe from the evidence that the alleged lease in evidence in this action was made and executed for the sole purpose and was intended by the parties to this action
Given. only as a security for the payment of a debt or to secure the payment of the taxes and annual assessment work on the premises described in the complaint and to indemnify and save the plaintiffs harmless therefrom, then, in that case, the alleged lease is, in law and effect, a security or mortgage and not a lease, and you will find for the defendant in this action.

8.

If the jury are satisfied and find from the evidence that the deeds and contract to reconvey the premises therein described constitute a mortgage, then the plaintiffs could not demise and let
Given. such premises to the defendant, and the relation of landlord and tenant could not be created between them by virtue of said alleged lease, and unless said relation did exist between them the plaintiffs cannot recover in this action.

9.

The court instructs the jury that before there *there* can be a valid contract between two parties the minds of the two parties
Given. must come together and agree upon the terms and conditions of the contract; or, as is sometimes said, the minds of the contracting parties must meet.

69 10.

The court instructs the jury that any promise for which there is no consideration cannot be enforced in law, and that it
Given. is incumbent upon the plaintiffs to prove a consideration for the alleged lease or demise of the property described in the complaint to enable them to recover in this action.

11.

The court instructs the jury that when the date of a deed or written lease and the delivery are different a deed or
Given. written lease of real estate takes effect from the date of its delivery and not from the date of the deed or lease.

12.

The court instructs the jury that this is an action for an unlawful holding over, and such an action cannot be maintained unless the relation of landlord and tenant is shown to have existed between the plaintiffs and defendant, and the production of the
Given. lease in evidence will not of itself prove such relation, but the entry of the defendant under the lease or a holding of the premises by him referable to the lease must also be proven to entitle the plaintiffs to a verdict.

The following three instructions requested by the defendant were refused by the court and not given to the jury:

2.

70 The court instructs the jury that an absolute deed and a seperate written contract to reconvey, both of said instruments being under seal and bearing even date on their face and having been executed and delivered at the same time, between the same parties, conveying and agreeing to reconvey the same land to the grantor in the said deed upon the condition of the payment by him of a certain sum of money to the grantee in said
Refused. deed at a particular future date or within a certain period mentioned in said contract to reconvey, such instruments together constitute and are in law and effect a mortgage and will not convey any interest in and to the premises or entitle the grantee or grantees in the deed to the possession of the land described therein, either before or after condition broken, and he or they could not thereunder make a valid demise of said land and premises to the grantor is said deed.

6.

If the jury believes from the evidence that the defendant was induced to sign and execute the alleged lease in evidence herein by the deceit, misrepresentation, trick, or fraud of the
Refused. plaintiffs or that the defendant executed the same by and under an innocent mistake or misapprehension as to the facts, then said lease is invalid and void and you will find for the defendant.

7.

The court instructs the jury that if they after a full and
71 fair consideration of all the facts and circumstances in evidence in this case are still in doubt as to whether said deeds and contract to reconvey were made and intended to
Refused. secure the payment of a debt, loan, or an advance of money and together to constitute a mortgage, then they should find such to be the fact.

72 *Verdict.*

Title of the Court and Cause.

We, the jury in the above-entitled case, find for the plaintiffs for the restitution of the premises in controversy and for the sum of twenty-one hundred and seventy-five dollars, the value of the rent of the same since the 21st day of May, 1886.

(Signed) L. R. WADE, *Foreman.*

Dated October 16, 1886.

Endorsed: Filed Oct. 16, '86. (Signed) R. L. Davis, clerk.

73 *Judgment of the Court.*

Title of Court and Cause.

Judgement on Verdict in Open Court.

The above cause came on for trial on the 14th day of October 1886, one of the days of the September term, 1886, of the above court. A jury of twelve men were duly empanneled and sworn to try the case. Evidence was introduced by plaintiffs and defendant on the 14th, 15th, and 16th days of October, and on said last day the case was argued by council and the jury were instructed by the court and retired to deliberate upon their verdict. Afterwards, on said 16th day of October, 1886, the jury returned into court and rendered unto court their verdict, duly signed by their foreman; and by said verdict they gave to the plaintiffs restitution of all the premises in controversy and named in the complaint and hereinafter particularly described and judgement for $2,175.00, the value of the rent of said premises since May 21st, 1886.

Now, therefore, by virtue of the law and the premises it is ordered, adjudged, and decreed that the plaintiffs have immediate restoration of the premises named in the complaint and every part and portion thereof, and that a writ of restitution issue out of this court to put the plaintiffs in possession of said premises; and, furthermore, that the plaintiffs have judgement for the sum of $2,175.00, the value of the rent of said premises since May 21st, 1886, and for the sum of $20.05, the costs of this action, which costs are
74 hereby taxed in said sum of $20.05, and that the plaintiffs have execution therefor against the property of the defendant.

The premises herein referred to are particularly described as follows, to wit:

The Berlin quartz lode claim, described by United States survey as lot No. 98, section 7, T. 3, R. 7 W., principal base and meridian of Montana Territory, containing 17.43 acres.

The Margaritha Lode claim, located July 23rd, 1881, recorded Book A of Lode Locations, records of Silver Bow county.

The Gustavus mining claim, located August 12th, 1880, recorded Book L of Lode Locations, page 408, records of Deer Lodge county.

The Eva Lode mining claim, located February 9, 1882, recorded Book B of Lode Locations, page 128, records of Silver Bow county.

The Leaf Lode mining claim, west of the Lynchburg and north of said Margaretha claim.

All said claims being in Summit Valley mining district, Silver Bow county, Montana Territory.

Together with all buildings and improvements of every kind on said premises.

And the following-described portion of lot number 5, in block number 29, in the city of Butte, said county and Territory, according to the official plat and survey of said city: Beginning at the northeast corner of said lot number 5, running thence along the east bound-ry line of said lot 21 feet and 3 inches, more or less, to the middle of the south wall of the brick building standing
75 thereon and known as the Revere house, formerly the Virginia chop-house; thence west along the middle of said wall sixty-four and one-half feet, more or less, to the stone sill of the window next to and east of the door in the first story of said building; thence south seven and one-half feet; thence west twenty-seven and one-half feet, more or less, to the west bound-ry of said lot; thence north along said west bound-ry line twenty-eight and one-half feet, more or less, to the northwest corner of said lot; thence east along the north bound-ry line of said lot ninety-two feet, more or less, to the northeast corner, the place of beginning, and the building and buildings and improvements of every kind on said lot.

Entered the 16 day of October, 1886.

(Signed) R. L. DAVIS, *Clerk.*

76 . *Notice of Appeal.*

Title of Court and Cause.

Please take notice that the defendant in the above-entitled action hereby appeals to the supreme court of Montana Territory from the judgment therein made and entered in the said district court on the 16th day of October, A. D. 1886, in favor of the plaintiffs in said action and against the defendant therein, and from the whole thereof.

Dated this 30th day of December, 1886.

(Signed) JOHN T. BALDWIN,
Att'y for Defendant.

To the clerk of said district court and to S. De Wolfe and Wm. H. De Witt, Esqrs., attorneys for plaintiffs.

We hereby admit service of the above notice of appeal to have been made on us this 30th day of December, 1886.

(Signed) WILLIAM H. DE WITT,
S. DE WOLFE,
Of Council for Plaintiffs.

Endorsed: Filed Dec. 30th, 1886. R. L. Davis, clerk, by (signed) Charles S. Warren, deputy clerk.

77 *Undertaking on Appeal.*

Title of Court and Cause.

Whereas Gustavus Bogk, the defendant in the above-entitled action, is about to appeal to the supreme court of the Territory of Montana from a judgment made and entered against him in the said action in the said district court in favor of the plaintiffs in the said action on the 16th day of October, 1886, for the recovery of the possession of certain lands and premises therein described and twenty-one hundred and seventy-five dollars damages for the detention thereof and twenty dollars and five cents costs of suit:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, John M. Steward and Edward Hickey, of the county of Silver Bow, Montana Territory, do hereby jointly and severally undertake and promise on the part of the appellant that the said appellant will pay all damages and costs which may be awarded against him on the appeal or on a dismissal thereof not exceeding three hundred dollars; to which amount we acknowledge ourselves jointly and severally bound.

Dated Dec. 31st, 1886.

(Signed) JOHN M. STEWARD. [SEAL.]
" EDWARD HICKEY. [SEAL.]

78 TERRITORY OF MONTANA, } ss:
County of Silver Bow, }

John M. Steward and Edward Hickey, the persons named in and who subscribed the foregoing undertaking as the sureties thereto, being severally duly sworn, each for himself says—

That he is worth the amount specified in the said undertaking as the penalty thereof over and above all his just debts and liabilities, exclusive of property exempt from execution, and that he is a resident and freeholder within the Territory of Montana.

(Signed) JOHN M. STEWARD.
" EDWARD HICKEY.

Subscribed and sworn to before me this 31st day of Devember, 1886.

(Signed) CALEB E. IRVINE,
Notary Public.

79 *Assignments of Errors in Law by the Defendant.*

I. The court erred in admitting the lease, marked "Exhibit D," in evidence because it was incompetent, immaterial, and irrelevant testimony, in this, it contradicted the evidence previously introduced by plaintiffs, viz., the two deeds and contract to reconvey, marked Exhibits "A," "B," "C." Those instruments show that the plaintiffs had, not have, no estate or right of possession in and to the demanded premises in the complaint described; but, on the contrary, show the def't to be the owner of and entitled to the possession thereof, and that the pl'ffs had no estate, title, or right of possession in and to the demanded premises which they could convey and demise to the defendant by said lease, and that said lease was null and void.

II. The court erred in overruling defendant's motion for nonsuit, failed in this action at the close of the plaintiffs' evidence, for the reason that all the evidence introduced by the plaintiffs in this action fails entirely to show or prove that they were ever, at any time or at all, in or entitled to the possession of the demanded premises in the complaint described, and does not show that the defendant ever entered into or held possession of said premises under or by virtue of said lease or referable thereto; but, on the contrary, proved that the defendant was the owner of and entitled to the possession of the demanded premises at the time of the date of the execution of said alleged lease, also at the time of the commencement of
80 this action and for a long time prior thereto as the owner thereof, and that he was not, in anywise, at any time, in the possession of the said premises as the tenant of the plaintiffs, and that the relation of landlord and tenant did not exist between the pl'ffs and the defendant at any time since the 19th day of May, 1885, or at any other time or at all.

III. The court erred in admitted and not striking out the testimony of witnesses Jas. H. Steele and Harry Gassert, given on re-

buttal for the plaintiffs, concerning conversations, oral agreements, and understandings by and between the pl'ffs and the defendant at the time of and prior to the execution and delivery of the two deeds and contract to reconvey, put in evidence by pl'ffs and marked Exhibits "A," "B," and "C." Said evidence is incompetent, irrelevant, and immaterial for the reason that it contradicts, alters, and varies the evidence contained in said two deeds and contract to reconvey, and said oral testimony is secondary evidence and no foundation for its admission was laid. The deeds and contract to reconvey *is* the primary and best evidence of the agreements and understandings of the parties to the transaction; and said parol testimony was incompetent for the further reason that it tends to convert a mortgage into an absolute deed.

IV. The court erred in giving each, every, and all of the instructions requested by the plaintiffs, and numbered from 1 to 7, inclusive, because the said instructions and every of them do not correctly state the law as applicable to the facts in evidence and issues in this action and tend to mislead and prejudice the jury to the
81 injury of the def't.

V. The court erred in refusing to give the instructions numbered 2, 6, and 7 requested by the defendant, for the reason that said instructions numbered 2, 6, and 7 and each and every of them correctly state the law as applicable to the facts in evidence and the issues in the action, and are necessary in order that the jury may arrive at a correct conclusion and verdict therein.

(Signed) J. T. BALDWIN,
Att'y for Appellant.

The foregoing engrossed statement on appeal is allowed and is correct.

18th December, 1886.

(Signed) WM. J. GALBRAITH, *Judge.*

Endorsed: Filed Dec. 21st, 1886. M. B. Henderson, clerk, by (signed) Charles S. Warren, deputy clerk.

82 *Transcript of E. A. Nichols, J. P.*

Title of Justice, Court, and Cause.

This action came on change of venue from W. I. Lippincott, Esq., a justice of the peace of said county, on the 4th day of June, A. D. 1886, the plaintiff above named claiming of the defendant possession of the north twenty-one feet and 3 inches of lot No. 5, in block No. 21, Butte, M. T., with the improvements thereon, known as the Revere house; also the possession of the Berlin, Margaretha, Gustavus, Eva, and Leaf quartz lode claims, in Summit Valley mining district, in said county of Silver Bow, and three hundred dollars damages for the detention of said premises, and the case was set for trial on the 4th day of June, A. D. 1886, at 3 o'clock p. m. of said day; and then, at the appointed hour, the parties appeared with their attorneys and announced themselves ready for trial.

And, upon motion of the attorneys for the defendant, it is ordered that this action be certified to the district court, to be held in Silver Bow county, Montana Territory, and that the defendant give a good and sufficient bond for the payment of any costs that may be awarded against him in said court.

(Sig.) E. A. NICHOLS,
Justice of the Peace.

Justice Lippincott's costs, $4.00, p'd by pl'ff.
" " on transcript, $2.50, p'd by def't.
Constable's " $2.65, p'd by pl'ff.
Justice Nichols' " $7.00, p'd by def't.

83 I hereby certify that the above and foregoing is a full, true, and correct transcript of all proceedings had by me in the above-entitled action.

(Signed) E. A. NICHOLS,
Justice of the Peace.

Butte, M. T., June 9th, 1886.

Justice Nichols' fees for transcript, $1.50.

Endorsed: Filed June 9th, 1886. R. L. Davis, clerk, by (signed) Charles S. Warren, deputy clerk.

84 *Undertaking of Defendant on Transmission to District Court.*

Whereas on the 4th day of June, 1886, it was ordered by E. A. Nichols, justice of the above-named court (justice court), that all further proceedings therein in said action should be suspended and that said action should be transmitted and certified to the district court of the second judicial district of Montana Territory in and for the county of Silver Bow:

Now, therefore, we, the undersigned, residents of Silver Bow county, Montana Territory, undertake in the sum of five hundred dollars ($500.00) and promise to the effect that the above-named defendant, Gustavus Bogk, will pay all costs and judgments that may be awarded against him on the trial of said action in said district court.

Witness our hands and seals this 5th day of June, 1886.

(Signed) JOHN M. STEWARD. [SEAL.]
" CARL KLEINSCHMIDT. [SEAL.]

TERRITORY OF MONTANA, } ss:
County of Silver Bow, }

John M. Steward and Carl Kleinschmidt, the persons mentioned in the foregoing undertaking, being duly sworn, says on oath each for himself—

That he is worth double the amount mentioned in the foregoing

undertaking over and above his debts and liabilities and
85 property by law exempt from execution in the Territory of Montana.

(Sig.) JOHN M. STEWARD.
" CARL KLEINSCHMIDT.

Subscribed and sworn to before me this 5th day of June, 1886.
(Sig.) JAMES W. FORBIS,
Notary Public.

Endorsed: Filed June 9, '86. R. L. Davis, clerk, by (signed) Charles S. Warren, deputy clerk.

86 & 87 *Clerk's Certificate.*

I, Frank E. Corbett, clerk of the district court of the second judicial district of the Territory of Montana, in and for the county of Silver Bow, do hereby certify that the foregoing transcript, from page 1 to 85, both inclusive, contains full, true, and correct copies of certain of the files, papers, and pleadings in the case of Harry Gassert *et al.* against Gustavus Bogk, file No. 1611 of the records of this court, as follows, to wit:

Complaint.
Answer.
Replication.
Defendant's bill of exceptions number one.
Defendant's bill of exceptions number two, including—
- Exhibit "A," deed, Bogk & wife to J. H. Steele.
- Exhibit "B," deed, Bogk & wife to Gassert & Redding.
- Exhibit "C," memorandum of agreement to reconvey.
- Exhibit "D," lease, Gassert, Reding & Steele to Bogk.
- Testimony of Thomas M. Lowry, direct and cross.
- Testimony of Jos. A. Hyde, direct & cross.
- Testimony of J. H. Steele, direct, cross, & redirect.
- Defendant's motion for a nonsuit.

Indorsement of time of filing statement on appeal.
Notice of filing statement on appeal.
Indorsement of time of filing amendments to statement on appeal.
Notice of filing amendments to statement on appeal.
Notice of presentment of statement on appeal and amendments thereto to judge for settlement.
Engrossed statement on appeal, including—
- All testimony offered on the trial of said cause.
- Defendant's Exhibit "8," mem. of expenditure.
- Instructions, given and refused, for pl'ffs & def't.
- Verdict.
- Judgment on verdict.
- Notice of appeal.
- Undertaking on appeal.
- Defendant's assignment of errors.

Transcript of E. A. Nichols, J. P.

Undertaking of defendant on transmission to district c't.

In witness whereof I have hereunto set my hand and affixed the seal of the said court this 29th day of January, A. D. 1889.

[SEAL.] (Signed) FRANK E. CORBETT, *Clerk.*

88 In the Supreme Court of Montana Territory, July Term, 1888.

HARRY GASSERT *et al.*, Respondents,
vs.
GUSTAVUS BOGK, Appellant.

Opinion of the Court.

BACH, *J.:*

This action was commenced on the 28th day of May, 1886, in the justice's court, Silver Bow county, under the law generally known as the summary proceeding by a landlord against his tenant holding over contrary to the terms of his lease. The defendant filed an answer setting forth a claim of title, whereupon the case was certified to the district court of Silver Bow county, in which court the cause was tried and trial resulted in a verdict and judgment for the plaintiff. The appeal is from the judgment. The judgment-roll is comprised of the pleadings and a statement on appeal which contains exceptions.

89 The first exception which we will consider is that which was taken by the defendant to the refusal of the court to grant a nonsuit at the close of the plaintiff's case.

It must be remembered that we are not considering a motion for a new trial, and that as to the question of nonsuit we must confine ourselves to the testimony then before the court. At the trial of the cause the plaintiff introduced in evidence a deed dated May 19th, 1885, by which deed the defendant, for and in consideration of the sum of $7,500 herein, granted to the plaintiff Steele, his heirs and assigns forever, and undivided one-half interest in and to the premises mentioned in the complaint; also a deed of the same date from the said defendant granting the plaintiffs Reding and Gassert, their heirs and assigns forever, an undivided one-half interest in and to the same property for a similar consideration; also an agreement bearing same date, by terms of which Steele, Reding, and Gassert agreed as follows:

Agreement.

Memorandum of agreement entered in at Butte City, Montana Territory on the 19th day of May, 1885, between Harry Gassert and Jacob Reding parties of the first part, James H. Steele, party of the second part, and Gustavus Bogk, party of the third part, all of Silver Bow county, Montana Territory, witnesseth:

Whereas the said Gustavus Bogk, and Margaretha Bogk his wife, have this day sold and by deed conveyed to said first and second

parties, in consideration of $7,500.00 respectively paid by
90 said first and second parties, an undivided one-half interest each in and to the north twenty-one feet three inches of lot number five (5) in block No. 29, in the city of Butte, according to the official plat and survey of said city, and a like undivided one-half interest each in and to the following mining lode claims situated and lying in Summit Valley district, Silver Bow county, Montana Territory to wit:

The Berlin, Margaretha, Gustavus, Eva and Leaf Lode claims, reference being made to the deed mentioned for a fuller description of said property, and whereas, the said Gustavus Bogk is desirous of having the right to repurchase said property within one year from the date of this agreement:

Now in consideration of the premises and of one dollar by him paid to said first and second parties, the receipt of which said last-named parties do severally hereby acknowledge, said first and second parties do hereby covenant and agree to resell and reconvey to said party the undivided one-half interest in and to the above-described property severally sold and conveyed to said parties by the said Gustavus Bogk and wife, provided said third party shall on or before the 19th day of May, 1886, pay or cause to be paid to said first party the sum of $8,967.50 and shall pay or cause to be paid to the said second parties a like sum of $8,967.00 on or before the said last-named date.

In witness whereof, said first parties by their attorney-in-fact Henry Jacobs, and said second party in person do hereunto set their hands and seals on the day and year herein first above written.

91 (Signed) HARRY GASSERT, [SEAL.]
By HANRY JACOBS,
His Attorney-in-Fact.

(Signed) JACOB REDING, [SEAL.]
By HENRY JACOBS,
His Attorney-in-Fact.

(Signed) JAMES H. STEELE. [SEAL.]

Duly verified and recorded in Silver Bow county, Montana.

It will be observed that no loan is referred to in either of said deeds on in said contract to reconvey; that said contract contains no promise on the part of Bogk to pay the sum mentioned and is not executed by him, and that said contracts refers directly to a sale. Plaintiff then introduced in evidence a lease of said premises, dated May 21st, 1885, executed by plaintiffs herein to said defendant for the term of one year at the annual rent of $450.00. The lease is signed by Bogk, and he herein covenants to surrender the premises upon the expiration of the term.

In addition to this plaintiff- introduced evidence to show reasonable value of the rents and profits and to show also that the defendant was holding over against the consent of his landlords. That is all the testimony introduced prior to a motion for a nonsuit. The absence of testimony sometimes is a material fact. Many of the

cases cited by council for appellant are determined upon the facts not before the court below at the time of the motion for a nonsuit; but as these facts are material in drawing the distinction to be made between the different cases cited upon the argument, we will
92 note them at this time. It will be observed, then, that up to this point in the case no evidence was given tending to show a previous loan or any application for a loan; that there is no evidence tending to show what was the value of the premises in question; that there is no evidence to contradict the presumption that the lease was executed two days after the deed's conveyance, as its date imports. The motion for a nonsuit was made upon the following grounds:

Motion for Nonsuit.

Title of Court and Cause.

Now comes the defendant in the above-entitled action and moves the court that the plaintiffs be nonsuited in this action for the reason that the evidence introduced by them in this action fails to prove their cause of action, in this: they failed to prove that they were at any time in possession or entitled to the possession of the premises described in the complaint, and that defendant ever entered into possession under and by virtue of said lease or referable thereto, and that the defendant totally failed to prove a demand to have been made for the possession of said premises by them or any one upon the defendant, and that the plaintiff ever or at any time served or gave notice to quit and deliver possession of same to the defendant or cause it to be done at any time or at all.

(Signed) JOHN T. BALDWIN,
Attorney for Defendant.

93 The complaint alleges that more than three days prior to the commencement of the action a demand in writing was made upon the defendant to deliver up the possession of the property, and further alleges the refusal of the defendant so to do. The answer contains no denial of these allegations. It was, therefore, necessary for plaintiff- to prove demand. The remaining ground upon which the motion for nonsuit was based is the main point in this case. Do the deeds, contract to reconvey, and the lease, when considered together, constitute a mortgage? If they do, then plaintiffs have failed to show a tenancy. If they do not, then the tenancy was proven. In considering this question particular attention must be given not only to the facts proved, but also to the absence of any evidence as to certain other facts to which reference had already been made. We will consider the case, 1st, in regard to the authorities cited, and then upon the principles which we think should control cases of this character.

The cases cited by appellant may be divided into three classes, and it will be seen that the third class alone is authority for his view of this case.

The first class includes those cases in which the papers (deed and bond) upon their face recite that the transaction is one for the security of a loan. This class includes the following cases cited by appellant:

Erskine *vs.* Townsend, 2 Mass., 493.
Beatty *vs.* Snooks, 5 Mich., 231.
Eurs *vs.* Sutherland, 11 ——, 539.
Perkins *vs.* Dibble, 10 Oh., 433.
Dey *vs.* Dunham, 2 John Ch., 182.
The Bank *vs.* Upmann, 12 Wis., 555.

94 The second class includes those cases where evidence *aliunde* shows that a mortgage and not a sale was intended, including cases where the evidence shows such facts as a previous loan, an application for a loan, great difference in value, application on the part of grantee to have the debt or paortion thereof repaid. Under this class may be placed the following cases cited by appellant:

Walker *vs.* Mining Co., 2 Col., 94, in which there was a note.
Trucks *vs.* Lindsey, 18 Iowa, 505, in which the court say that sale of land with contract to reconvey will be upheld where a sale and not a mortgage is intended.
Scott *vs.* Menherter, 49 Iowa, 487.
Presbaker *vs.* Freaman, 32 Ills., 475.
Ewart *vs.* Walling, 42 Ills., 453.
Clark *vs.* Finlon, 90 Ills., 246.
Crassen *vs.* Surreland, 22 Ind., 427.
Sharkey *vs.* Sharkey, 47 Mo., 543.
Ferris *vs.* Wilcox, 51 Mich., 105.
Marshal *vs.* Stewart, 17 Ohio, 356.
Stephens *vs.* Sherod, 6 Tex., 294.
Ruffier *vs.* Womach, 30 Tex., 341.
—— *vs.* ——, 14 Wis., 490.
—— *vs.* ——, 44 Wis., 514.
Robinson *vs.* Willoughby, 65 N. C., 520.
Overton *vs.* Bigelow, 3 Yerges, 513.

It will appear hereinafter cited that the courts of last resort in Texas and Michigan, Illinois, Wisconsin, Indiana, and Tennessee have held that a deed with a contemporaneous contract to reconvey are not *per se* mortgages.

The third class of cases is that in which the courts hold that a deed with contract to reconvey are *per se* mortgages. This class includes the cases from Vermont, Maine, Massachusetts, and Pennsylvania.

Looking at this case upon well-established principles and
95 confining ourselves strictly to the evidence before the court when the motion for a nonsuit was denied, we are forced to the conclusion that the ruling of the court was correct.

At the present time a mortgage is a security, and it is quite impossible to conceive of a conveyance which would or could be a

mortgage unless such conveyance was given to secure the performance of some act or obligation.

"A definition broad enough to cover any view of the transaction and any form of it can only be that it is a conveyance of land as security."

Jones on Mort., sec. 16.

"No conveyance can be a mortgage unless it is made for the purpose of securing the payment of a debt *of* the performance of a duty either existing at the time the conveyance is made or to be created or to arise in the future."

Morley *vs.* Dryden, 47 Mo., 226–271.

We are not to be understood as saying that there must be some promise in writing to pay the debt where the mortgage is given to secure the payment of money; that promise may be implied from the facts. Still the absence of any writing showing an express promise to pay is said to be strong evidence that the transaction was not one of security. See—

Horn *vs.* Keteltas, 46 N. Y., 605.
Morris *vs.* Budlong, 78 N. Y., 543.
Conway's Ex'rs *vs.* Alexander, 7 Cranch, 218, and other cases cited below.

96 This suggests the true test, which is, "What was the intent of the parties?" Was the intent to make a sale or to give a security for a debt. If intended as a security, then the conveyance is a mortgage. Was there a loan? If there is a loan, then there is a debt; if there is a debt, then there *there* is a duty to pay the debt, which dubt may be created by the act of the parties or by act of the law. If there is anything in the writing which shows a promise to pay or a loan and the debt resulting therefrom, then there is no difficulty in arriving at the intent of the parties. Such cases come plainly within the first subdivision above referred to. If the writings themselves are silent, parol evidence may be resorted to in order that the court may arrive at the intent of the parties, and in this connection the value of the property, the existance of a not-, the fact that a loan had been applied for, and the *indicia* of intent become material aid to the court. This class comes plainly under the second class above referred to. It is believed that the following authorities sustain the foregoing propositions:

Farmer *vs.* Grose, 42 Cal., 161.
Conway's Ex'rs *vs.* Alexander, 7 Cranch, 218.
Cornell *vs.* Hull, 22 Mich., 377.
Hubby *vs.* Harris, 68 Tex., 91.
Glover *vs.* Payn, 19 Wend., 518, and other cases cited below.

The following authorities sustain the proposition that
97 parole evidence may be admitted to show that the deeds and contract to reconvey were given as security and are, therefore, a mortgage:

Pengh *vs.* Davis, 96 U. S., 333.
Farmer *vs.* Grose, 42 Cal., 169.
Hickman *vs.* Cantrell, 9 Gerger, 171.
Derlin on Deeds, vol. 2, sec. 1136, and cases cited.
Jones on Mortgage, sec. 248, and cases cited, and the other cases cited herein.

In the case under consideration the deeds and contract upon their face show an absolute conveyance; no obligation appears therefrom binding Bogk to pay anything; no words appear from which the characteristic of security, so essential to a mortgage, can be deduced. *Prima facie* the transaction is one of sale; it is incumbent upon the defendant to produce some evidence tending to show that a mortgage in fact was intended.

Perdue *vs.* Bell, 3 So. Rep., 698 (Ala.).
Jay *vs.* Welcler, 3 S. E. Rep., 2, 906, Va.
Howard *vs.* Roppere, 5 S. W., 927.
Evans *vs.* Euloe, 24 N. W., 319 (Wis.).
Ferris *vs.* Wilcox, 51 Mich., 105.

This last case is cited by the applicant.

The court say, page 107: "The controversy thus stated is not one which necessarily must be determined upon the face of the papers. If it was, the plaintiffs would unquestionably be entitled to retain their judgement.

98 "By the contract the defendant appears to be purchaser, not mortgagor, and the surrendor or concealment of the notes would indicate payment and the determination of the relation of debtor or creditor."

The court then proceeds to examine the parol evidence, and holds the transaction to be one of mortgage.

Cornell *vs.* Hall, 22 Mich., 377.
Stephens *vs.* Allen, 3 Pac. Rp., 168 (Oreg.).
Winters *vs.* Smift, 3 Pac. Rp., 15 (Idaho).
Wilhelm *vs.* Wodcock, 5 Pac. Rp., 202 (Oregon).
Smith *vs.* Crosly, 47 Wis., 161.
Hay *vs.* Carr, 83 Ind., 275.
Farmer *vs.* Grose, 42 Cal., 169.
Miller *vs.* Yturria, 7 Pac., 206 (Texas).
Glover *vs.* Payn, 19 Wend., 518.
Hickman *vs.* Cantrell, 9 Yerger (Tenn.), 171.
Baker *vs.* Flwasher, 4 Denio, 493.
Adams *vs.* Adams, 51 Con., 544.
Rue *vs.* Dole, 107 Ill., 275.
Hanford *vs.* Blessing, 80 Ill., 188.
Hensley *vs.* Hotalling, 41 Cal., 22.

And the existance of the lease does not keep the defendant.

The lease bears date two days later than the deed and contract. If the defendant Bogk considers the deed and contract to reconvey to be a mortgage, why, then, did he take a lease of the premises two days later?

It is believed that the above authorities will sustain the following doctrines: First, neither equity nor the law forbids parties from making a sale of land with a contract to reconvey, and where parties enter into such a contract in good fa-th the contract will be upheld.

99 Second. Where the papers upon the face show a loan they will be construed to be a mortgage; third, parole evidence will be received to show that the transaction was in fact a mortgage, but it seems that where the papers on their face show a mortgage parole evidence will not be admitted to show that it was in fact a sale (see Derlin on Deeds, vol. 2, sec. 1144, and cases cited); fourth, where the papers do not show that a security was meant it is incumbent upon the party seeking to establish a mortgage to show that a mortgage was intended; fifth, where there is a deed and a contract to reconvey and oral evidence has been introduced tending to show that the transaction was one of security, and leaving upon the mind a well-founded doubt as to the nature of the transaction, then courts of equity incline to construe the transaction as a mortgage.

See Morris *vs.* Budlong, 78 N. Y., 543.
—— *vs.* Buchannan, 1 So. Rep., 898.
Ferris *vs.* Wilcox, 51 Mich.
Convay's Ex'rs *vs.* Alexander, 7 Cranch.
Hickman *vs.* Cantrell, 9 Yerger, 171.

But where there is a deed alone and it is sought to show a patole defeasance, then it seems the evidence must be clear and convincing. See—

McMillan *vs.* Bissell, 29 N. W., 737 (Mich.);
McConmick *vs.* Herndon, 31 N. W., 303 (Wis.),
And such cases cited in note.

The nonsuit was properly denied. This view of the case
100 disposes of the next objection which was taken to the ruling of the court admitting in evidence the lease referred to, the ground of the objection being that it contradicted documentary evidence previously introduced.

The next error alleged is the objection taken to the giving and refusal of certain instructions.

The next error assigned is the giving of certain instructions at the request of the plaintiffs and the refusal to give certain other instructions as requested by the defendant. The exception taken by the defendant was in all respects similar in form to that which was held to be insufficient in Wood *vs.* Berry, 7 Mont., 17 Pac. Rep.

We there held that there must be a seperate exception to each instruction deemed objectionable.

Appellant claims that this rule no longer applies because of the recent act of the legislature declaring that instructions given and the refusal to give instructions shall be deemed to be excepted to. This action was tried upon the 16th day of October, 1886. The law referred to was enacted on the 13th day of September, 1887.

It has been held that an amendment to the laws governing procedure applied to actions pending as well as to action commenced thereafter, so far as the amendment alters the practice in any style yet to be taken. Thus changes in the procedure on motion for a new trial and changes in the manner of taking an appeal apply to certain — pending where these steps in such actions have not already been taken as well as to actions commenced thereafter,
101 but such changes do not govern the practice where the motion for a new trial *was* already been made or where the appeal has already been taken. The hardship which would result from a contrary interpretation would be apparent if some succeeding legislature should amend the present law regarding exceptions to instructions by enacting that an exception must — taken to instructions granted to which objection is sought to be taken and that the exception must state specifically the grounds of the objection. If the rule of interpretation contended for by appellant be correct and if such a law should be passed every litigant who has relied upon the last law *past* by the last legislature above referred to would be without remedy against erroneous instructions.

But the legislature has removed from this question all doubt which may arise from a consideration of the various conflicting authorities.

Sec. 209, p. 649, Comp. Statutes, provides as follows: "No action, plea, prosecution, civil or criminal, pending at the time any statutory provisions shall be repealed shall be affected by such appeal, but the same shall proceed in all respects as if such statutory proceedings had not been repealed except that all such proceedings had after the taking effect of any statute passed at this session shall be conducted according to the provisions of such statute, and shall be in all respects subject to the provisions thereof so far as they are applicable." Of the three instructions requested by the defendant and refused by the court two are plainly not the law, and
102 the one remaining is so unintelligible that the court below was warranted in refusing it upon that ground alone.

It is claimed that the district court had no jurisdiction to try the cause because the justice's court had no jurisdiction, first, because the title to real estate is envolved, and, second, the amount of damages is in excess of the amount which limits the jurisdiction of justice's court.

This would be true if the case had been taken by appeal from the justice's court to the district court; in such case the jurisdiction of the latter court is limited by that of the former, and it could render no judgement which the former court could not render. But this cause was not taken to the district court by appeal, but was at the request of the defendant certified to that court by the justice of the peace under section 779, division first, comp*l*ied.

By the terms of that statute the district court obtains the same jurisdiction over the action as if it had been originally commenced therein. *If* it is a distinct and seperate mode, perhaps, of bringing such actions and the defendants therein into the district courts; but it is a very fair and efficacious one, tending to insure good faith on the part of defendants in such action when they plead adverse title. The defendant brings himself by his own motion into the district court, which obtains thus an original and not an appellate jurisdiction.

The judgement is affirmed with costs.

(Signed) THOS. C. BACH,
Associate Justice.

We concur.

(Signed) N. W. McCONNELL, *C. J.*
" W. J. LIDDELL, *A. J.*

103 *Order of Court.*

In the Supreme Court of the Territory of Montana, January Term, 1889.

HARRY GASSERT *et al.*
vs.
GUSTAVUS BOGK.

In the above-entitled cause it is ordered that the appellant be permitted to file a copy of the record to replace the original record in this case that is missing from the files of the court.

January 19th, 1889.

A true copy.
Attest: R. L. WORD, *Clerk.*

[Seal Supreme Court, Montana Territory.]

104 *Judgment of the Court.*

In the Supreme Court of the Territory of Montana, July Term, A. D. 1888.

HARRY GASSERT *et al.*
vs.
GUSTAVUS BOGK.

This cause came on this day for the decision and judgment of the court on appeal. Whereupon, on consideration, it is now here ordered and adjudged by this court that the judgment of the court below entered in this cause on the 16th day of October, A. D. 1886, be, and the same is hereby, affirmed.

September 15th, 1888.

105 In the Supreme Court of the Territory of Montana, July Term, A. D. 1888.

HARRY GASSERT *et al.*
vs.
GUSTAVUS BOGK.

Order of the Court.

On motion of appellants the supersedeas bond on appeal to the Supreme Court of the United States is hereby fixed at five hundred dollars.

September 15th, A. D. 1888.

106 Know all men by these presents that we, Antoine Marcean and John M. Steward, are held and firmly bound unto Harry Gassert, Jacob Reding, and James H. Steele in the full sum of five hundred dollars, lawful money of the United States, to be paid to the said Harry Gassert, Jacob Reding, and James H. Steele or their attorneys, executors, administrators, or assigns; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly *to* these presents.

Sealed with our se-ls and dated this 13th day of November, 1888.

Whereas lately, at a term of the supreme court of the Territory of Montana, in a suit pending in said court between Harry Gassert, Jacob Reding, and James H. Steele, plaintiffs and respondents and defendants in error herein, and Gustavus Bogk, defendant and appellant and plaintiff in error herein, there was rendered a final judgment in favor of the said plaintiffs and respondents and against the defendant and appellant for more than five thousand dollars, exclusive of the costs, and the said defendant having sued out a writ of error from the Supreme Court of the United States to reverse the said judgment and lodged a copy of said writ in the clerk's office of the supreme court of the Territory of Montana for inspection, and a citation directed to the said defendants in error, admonishing them to be and appear at the Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said plaintiff in error shall prosecute his said writ of error
107 to effect and answer all damages and costs if he shall fail to make good his plea, and shall pay such sum as may be recovered for damages for delay and costs and interest on this appeal, then the above obligation to be void; otherwise to remain in full force and effect.

(Sig.) ANTOIN*O* MARCEAN. [SEAL.]
(Sig.) JOHN M. STEWARD. [SEAL.]

Sealed and delivered in the presence of—

(Sig.) JOHN E. AKERS.

TERRITORY OF MONTANA, } ss:
County of Silver Bow, }

Antoine Marcean and John M. Steward each for himself makes oath and says that he is one of the parties upon the *g*oregoing undertaking; that he is a resident and freeholder of the county of Silver Bow; that he is worth the amount named in the foregoing undertaking as the penalty thereof over and above his just debts, liabilities, and property exempt by law from execution in the Territory of Montana.

(Signed) ANTOINE MARCEAN.
(Signed) JOHN M. STEWARD.

Subscribed and sworn to before me this 13th day of November, A. D. 1888.

[SEAL.] (Signed) CALEB E. IRVINE,
Notary Public.

Approved and supersedeas ordered.

(Signed) N. W. McCONNELL,
Chief Justice of Montana Territory.

Filed Nov. 14th, A. D. 1888.

(Signed) R. L. WORD, *Clerk.*

108 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court.

GUSTAVUS BOGK, Plaintiff in Error,
vs.
HARRY GASSERT, JACOB READING, JAMES H. STEELE, Defendants in Error.

To Harry Gassert, Jacob Reding, and James H. Steele, defendants in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1889, pursuant to a writ of error filed in the clerk's office of the supreme court of Montana Territory, wherein Gustavus Bogk is plaintiff in error and Harry Gassert, Jacob Reding, and James H. Steele — defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness Honorable N. W. McConnell, chief justice of the
109 supreme court of the Territory of Montana, this 9th day of Nov., A. D. 1888.

N. W. McCONNELL,
Chief Justice of the Supreme Court of the Territory of Montana.

Filed Nov. 14th, A. D. 1888.

R. L. WORD, *Clerk.*

110 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the supreme court of the Territory of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Montana Territory, before you or some of you, in a cause between Harry Gassert, Jacob Reding, and James H. Steele, defendants in error, and Gustavus Bogk, plaintiff in error, a manifest error has happened, to the great damage of the said Gustavus Bogk, plaintiff in error, as by his complaint appears, we, being willing that error, if any — happened, should be duly corrected and full and speedy justice done to the parties aforesaid in that behalf, do command you that, if judgment be herein given, *that* then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, together with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2nd Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the customs and laws of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 9th day of November, 1888.

[Seal Supreme Court, Montana Territory.]

Attest: R. L. WORD,
Clerk of the Supreme Court of the Territory of Montana.

Filed Nov. 14th, A. D. 1888.

R. L. WORD, *Clerk.*

111 In the Supreme Court of the Territory of Montana.

GUSTAVUS BOGK, Plaintiff in Error,
vs.
HARRY GASSERT, JACOB REDING, and JAMES H. STEELE, Defendants in Error.

Due service of a copy of the writ of error, citation, and undertaking in the above-entitled action made this 13th day of November, 1888.

(Signed) WM. H. DE WITT,
(Signed) W. W. DIXON,
Attorneys for Defendants in Error.

Filed Nov. 14th, 1888.

(Signed) R. L. WORD, *Clerk.*

112 In the Supreme Court of the Territory of Montana.

GUSTAVUS BOGK, Plaintiff in Error,
vs.
HARRY GASSERT, JACOB READING, and JAMES H. STEELE, Defendants in Error.

TERRITORY OF MONTANA, *County of Silver Bow*, } *ss:*

John M. Steward and Gustavus Bogk each for himself makes oath and says that he is well acquainted with the property involved herein and knows the value of the same, and that the value thereof, over and above any mortgage, lien, or claim of the said defendants in error, largely exceeds the sum of five thousand dollars; and further affiant- say*eth* not.

(Signed) JOHN M. STEWARD.
(Signed) GUSTAVUS BOGK.

Subscribed and sworn to before me this 13th day of November, 1888.

(Signed) CALEB E. IRVINE,
[SEAL.] *Notary Public.*

Filed Nov. 14th, 1888.
(Signed) R. L. WORD, *Clerk.*

113 In the Supreme Court of the Territory of Montana.

HARRY GASSERT *et al.*, Plaintiffs and Respondents,
vs.
GUSTAVUS BOGK, Defendant and Appellant.

Certificate of Clerk.

I, R. L. Word, clerk of the supreme court of the Territory of Montana, do hereby certify that the above and foregoing transcript, from page 1 to 113, inclusive, contains a full, true, complete, and correct copy of the transcript on appeal to this court, of the opinion and judgment of this court, and of the several orders, motions, and papers on file and of record in this court in the case of Harry Gassert *et al.*, plaintiffs and respondents, and Gustavus Bogk, defendant and appellant.

In witness whereof I have hereunto set me hand and affixed the seal of the said supreme court this 8th day of October, A. D. 1889.

[Seal Supreme Court, Montana Territory.]

R. L. WORD,
Clerk of the Supreme Court of the Territory of Montana.

Endorsed on cover: Case No. 13,768. Montana Territory supreme court. No. 179. Gustavus Bogk, plaintiff in error, *vs.* Harry Gassert, Jacob Reding, and James H. Steele. Filed October 14, 1889.

149 U.S. 17

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JAMES H. McKENNEY,
CLERK.

In the Supreme Court

OF THE UNITED STATES.

OCTOBER TERM, 1892.

GUSTAVUS BOGK,
Plaintiff in Error.

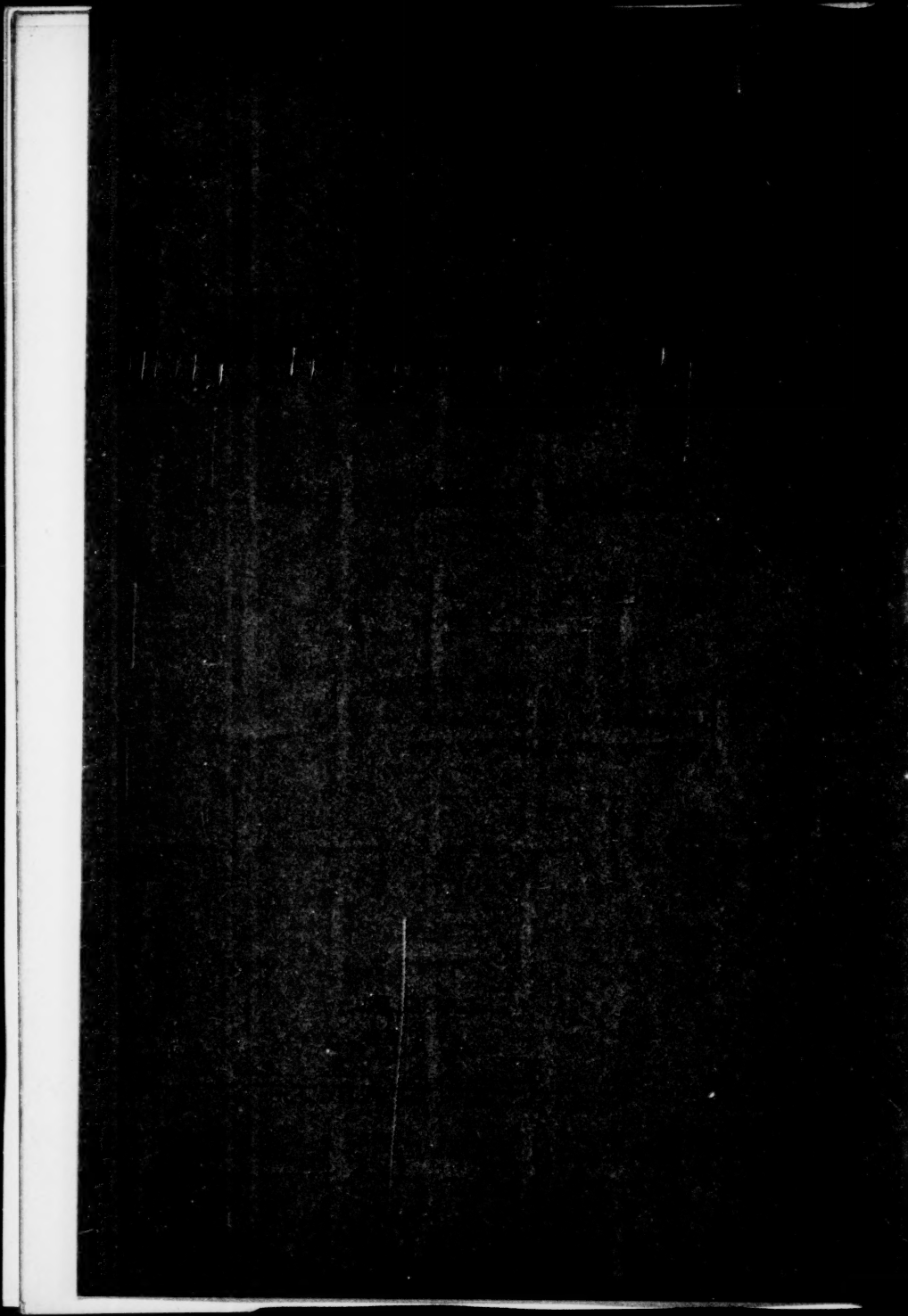
vs.

HARRY GASSERT, JACOB REDING, and JAMES H. STEELE,
Defendants in Error.

In Error from the Supreme Court of the Territory of Montana.

EDWIN W. TOOLE,
and WM. WALLACE, JR.,
Of Counsel for Plaintiff in Error.

C. K. WELLS CO., PRINTERS AND BINDERS, HELENA, MONT.



In the Supreme Court

OF THE UNITED STATES.

OCTOBER TERM, 1892.

GUSTAVUS BOGK,
Plaintiff in Error.

vs.

HARRY GASSERT, JACOB REDING, and JAMES H. STEELE,
Defendants in Error.

In Error from the Supreme Court of the Territory of Montana.

I.

STATEMENT OF THE CASE.

On the second day of February 1889, the defendants in error commenced this action before a Justice of the Peace of Silver Bow Township, in the County of Silver Bow and State of Montana, to recover possession

of the premises in controversy. The action was based upon what is designated as a lease, dated May 21st, 1885, and is exhibit "D" on page 10 of record. The complaint *alleges* that the lease was entered into on said day by the parties hereto; that plaintiff in error by its terms leased of defendants said premises for the period of one year from the date of the lease; that he agreed to pay the sum of four hundred and fifty dollars for the use of the same on or before the 1st day of December, 1885, and upon the expiration of the term for which said premises were leased to surrender and deliver up the premises, reasonable wear and tear, etc., excepted; that since the lease plaintiff continued to hold and occupy the leased premises; that the term for which they were leased expired on the 21st day of May, 1886, and that plaintiff continues to hold over without the consent of defendants; that defendants made demand in writing for the possession of said premises; that three days thereafter had elapsed and plaintiff refused and still refuses to deliver possession, and that he unlawfully detains the same contrary to the statute in such case made and provided.

The answer of plaintiff denies the making of said lease, except as set forth in his answer; denies that he unlawfully holds over the premises or any part of them, and denies that defendants were ever possessed or en-

titled to the possession of the premises or any part thereof.

Plaintiff affirmatively alleges: That on the 19th day of May, 1885, and for a long time prior thereto, defendant was, and has ever since been and is now the owner and in possession and entitled to the possession of the property described in plaintiffs' complaint and every part and parcel thereof; that on said 19th day of May, 1885, defendant and his wife executed to plaintiffs a deed conveying to plaintiffs all the premises described in plaintiffs' complaint, which said deed was absolute upon its face.

That the said deed was made and delivered and intended by defendant and understood and accepted by plaintiffs as a mortgage to secure the payment of the sum of seventeen thousand nine hundred and twenty dollars ($17,920.00), which said sum was owing from defendant to plaintiffs, and was payable on the 29th day of May, 1886; that at the date of the execution of the said deed plaintiffs agreed in writing with the said defendant that all of said property should be reconveyed to defendant upon the payment by defendant to plaintiffs of said sum of $17,920.00.

That plaintiffs by said deed did not acquire title in

fee to said property, but only a mortgagee's lien thereon, and it was so understood between the said parties.

That afterwards, to-wit, on the 21st day of May, 1885, and in connection with and as a part and parcel of the transaction hereinbefore set forth, defendant did enter into a certain agreement in writing with plaintiffs in the form of a lease of said premises for plaintiffs to defendant for one year from said date for the consideration therein named of four hundred and fifty dollars ($450.00).

That said sum of four hundred and fifty dollars ($450.00) was the amount computed by said parties, and was so understood between them, that would be necessary to pay the taxes upon said property and the annual assessment work upon the said mining property during the term of said mortgage. That the said instrument alleged to be a lease was made, accepted and understood between the parties thereto as a security that said defendant should pay said sum of $450.00 and save said plaintiffs harmless therefrom, and that upon the payment thereof by defendant the object of said lease should be fully satisfied and discharged.

That defendant has paid said sum of $450.00 and saved said plaintiffs harmless from all payments as above

set forth, and that said lease thereupon became void and of no binding force.

Defendants in reply

Deny that at any time since May 21st, 1886, defendant has been the owner or entitled to the possession of the premises in controversy, or any part thereof.

Deny that the deed described in the answer was made, delivered, or intended by defendant, or understood or accepted by plaintiffs as a mortgage, as alleged in the answer, but was an absolute deed.

Allege that plaintiffs did acquire an absolute fee-simple title by said deed, and not a mortgage lien, nor was it so understood by the parties.

That the lease mentioned in said answer was not a a part and parcel of said deed, but was a separate instrument, and was so understood by the parties.

That the amount of $450.00 mentioned in the answer was and was intended to be rent for said premises under said lease; that said lease was not intended as a ecurity, as alleged in the answer, nor was it made, accepted or understood as such by the parties, but was sntended as a lease, as appears upon the face thereof.

Upon the pleadings thus filed the Justice transferred the case, in accordance with the statute, to the District

Court of Silver Bow County. On the 16th day of October, 1886, the case came on in the said court for trial before a jury, and under the issues presented the defendants introduced in evidence two certain deeds, a certain agreement and the lease mentioned, which are marked respectively A, B, C & D, and appear in the record on pages 5, 6, 7, 8, 9, 10 and 11. In addition to this documentary evidence, defendants also produced Thomas M. Lawry, Joseph A. Hyde, James H. Steele and Henry Gassert, with the exception of the first witness, who testified that the monthly rental values of the Main Street property was from $450.00 to $500.00 per month; the others testified that it was of the value of $500.00 per month. The latter witness, being one of the defendants in error, testifies that the plaintiff held possession since the 21st of May last, without his consent or the consent of the other defendants, as will appear by record pages 11, 12 and 13. Defendants then rested their case, whereupon plaintiff moved for a non-suit, which was overruled, and to which ruling plaintiff excepted, as will appear by bill of exceptions, record pages 5 to 13 inclusive, which constitutes the first error assigned.

The trial thereupon proceeded, and plaintiff in error introduced sundry witnesses showing the value of the Main Street property to be from $18,000 to $25,000, and

the other property to be from $22,000 to $25,000, making in all the lowest estimate at $40,000 and highest at $50,000; that the negotiations commenced for a loan; that the object was to raise money and pay off judgments, mortgages, liens, etc., upon the property; that defendants never had possession of any of it; that interest was computed upon the amount advanced, and that the lease was given to secure the representation of the mining property and pay the taxes, and that the transaction was intended as a mortgage. See record, pages 16 to 25 inclusive.

In rebuttal defendants Steele and Gassert were produced and sworn. The former testified under objections to the conversation of the parties to the deeds and agreement before making them and at the time of making them. See pages 25 and 26 of record. The latter was asked the following question: "State what conversation "took place at my (DeWolf's) office at the time these "deeds and this contract to reconvey were made." To this interrogatory the following objection was made: "Objected to by counsel for defendant for the reason that "said question would call forth and elicit incompetent, "irrelevant and immaterial testimony; which objection "was by the court overruled, and defendant then and there "duly excepted to said last ruling of the court." The defendant Gassert then detailed said conversations, which

were unfavorable to the case of plaintiff. Whereupon he moved to strike out the same, which was overruled and exceptions duly taken. See statement in record, pages 26 and 27.

The admission of these conversations under objections and exceptions of plaintiff constitutes the second assignment of error.

After the evidence had closed, defendants in error offered seven separate instructions, maintaining the theory upon which they tried said action, to the effect that unless there was a personal obligation on the part of plaintiff to repay the amount advanced by defendants, upon which a recovery could be had, the transaction was a conditional sale and not a mortgage, regardless of the inadequacy of consideration, computation of interest, or any other evidence tending to show that the transaction was a mortgage, which were severally given by the court, numbered 1 to 7, as will appear from record, pages 28 to 30 inclusive.

It will appear from plaintiff's bill of exceptions, record pages 4 and 5, that to the giving of said instructions he "then and there, by his counsel, duly excepted," which constitutes the third assignment of error.

It will also be seen that the court gave two conflicting instructions, being instruction No. 3, on the part of de-

fendants in error, record page 29, and instruction 4, on the part of plaintiff in error, record page 31, which will be considered in connection with the last exceptions. It will also be seen, record pages 32 and 33, that the court refused to give instructions 2, 6 and 7 on the part of plaintiff, to which he also duly excepted, as will be seen by bill of exceptions, record pages 4 and 5, which constitutes the fourth assignment of error to be considered upon this trial.

II.

ASSIGNMENT OF ERRORS.

First: Error of the court in overruling plaintiff's motion for a non-suit.

Second: Error in admitting in evidence the conversation of the parties at the time of the execution of the deeds, agreement and lease.

Third: Error of the court in adopting the theory announced throughout the instruction given on the part of defendants that the transaction could not amount to a mortgage unless there was a personal liability on the part of plaintiff upon which a recovery could be had, and error in giving conflicting instructions upon said matter.

Fourth: Error in not giving either of instructions 2, 6 and 7, as requested by plaintiff.

III.

BRIEF OF ARGUMENT.

We will take up the questions as they are presented in the record.

First. Did the Court err in overruling plaintiff's motion for a non-suit?

The section of the statute of the Territory of Montana under which the motion for a non-suit was made, is identical with the present Compiled Statutes of the State, and reads as follows:—

"Sec. 242. An action may be dismissed or a judgment "of non-suit entered in the following cases: * * * Fifth, "By the court upon motion of the defendant, when upon "the trial, the plaintiff fails to prove a sufficient case "for the jury." The exception to the ruling of the court was taken by bill of exceptions in this case, embodying the evidence, as will be seen by bill of exception No. 2, record p. 5 to 13. In Kleinschmidt and others vs. McAndrews, 4 Montana, p. 223, 5 Pac. Rep., 281, the Supreme Court of Montana held that this was improper under the practice of the Territory and that the question could only be reviewed on a statement on appeal. That

case was brought to this Court on writ of error, and as a court of appeals for the Territories, it reversed this decision of the Territorial Supreme Court upon tihs matter of practice, and held that the exception was properly preserved under the practice act of the Territory.

Kleinschmidt et al. vs. McAndrews, 117 U. S., 282.

So that notwithstanding the ruling of the Supreme Court upon the question of practice mentioned, this Court has overruled the same, and we shall assume that the question is properly presented by the bill of exceptions referred to in the record.

Two questions are therefore material in considering this motion. *First:* Did the deeds and agreement to reconvey of themselves constitute a mortgage? *Second:* If not, the gross inadequacy of the rent, according to the evidence, and utter want of testimony that plaintiff ever entered, or held possession under the lease, rebut the presumptions of a conditional sale arising from the instruments, and make a *prima facia* case for plaintiff. If, in the judgment of the Court, either of these positions are correct in principle, the non-suit should have been sustained. The statute of the Territory applicable, being identical with the present statute of the State, is as follows: Sec. 371. "A mortgage of real property shall "not be deemed a conveyance, *whatever its terms*, so as

"to enable the owner of the mortgage to recover pos-
"session of the real property without foreclosure and
"sale."

Under this statute the policy of the legislation of the State is fully manifested, and it can make no difference whether the effort to get this possession is in the guise of a lease or an absolute deed and an agreement to reconvey. If it was intended as a security it is a mortgage, whether there be any personal obligation or liability to repay or not.

Did the deed and defeasance, or agreement to reconvey, *per se* constitute a mortgage? If it did, the lease could amount to no more than a security, as a mortgagee is never entitled to the rents and profits until he acquires actual possession.

Teal vs. Walker, 111 U. S., 242 et seq.

This is a well-considered case upon this question, in which the court reviews the authorities at length and reaches the conclusion that if the deed and agreement to reconvey is a mortgage, and that until foreclosure and sale the mortgagee would not be entitled to possession or the rents, issues and profits of the mortgaged premises. In that case, pages 247, 251 and 252, this Court uses this language:

"It is clear, upon the authorities, that the three "deeds executed by Goldsmith and Teal jointly, and the "several deeds executed by Goldsmith alone, to Hewett "August 19, 1874, and the defeasance executed on that "day by Hewett and Walker, are to be construed to-"gether, and so construed they constitute a mortgage "given to secure a debt." * * * 251.

"The case against the right of the defendant in "error to recover in this case the rents and profits re-"ceived by the owner of the equity of redemption is "strengthened by Section 323, Chapter 4, Title 1, General "Laws of Oregon, 1843–1872, which declares that 'A mort-" 'gage of real property shall not be deemed a conveyance " 'so as to enable the owner of the mortgage to recover " 'possession of the property without a foreclosure and " 'sale according to law.' This provision of the statute "cuts up by the roots the doctrine of Moss. vs. Gallimore, "*ubi supra*, and gives effect to the view of the American "courts of equity that a mortgage is a mere security for "a debt, and establishes absolutely the rule that the mort-"gagee is not entitled to the rents and profits until he "gets possession under a decree of foreclosure. For if a "mortgage is not a conveyance, and the mortgagee "is not entitled to possession, his claim to the rents is "without support. This is recognized by the Supreme

"Court of Oregon as the effect of a mortgage in that "State. In Besser vs. Hawthorn, 3 Oregon, 133, it was "declared: 'Our system has so changed this class of con- " 'tracts that the mortgagor retains the right of possession " 'and the legal title.' * * * The case of the defend- "ant in error cannot be aided by the stipulation in the de- "feasance of August 19, 1874, exacted by the mortgagee, "that Goldsmith and Teal would upon default in the pay- "ment of the note secured by the mortgage deliver to "Hewett, the trustee, the possession of the mortgaged "premises. That contract was contrary to the public policy "of the State of Oregon, as expressed in the statute just "cited, and was not binding on the mortgagor or his "vendee, and, although not expressly prohibited by law, "yet, like all contracts opposed to the public policy of the "State, it cannot be enforced. * * * As this conclu- "sion takes away the foundation of the suit, it is unneces- "sary to notice other assignments of error."

The Court in its opinion cites with approbation Nugent vs. Riley, 1 Met., 117; Wilson vs. Shoenberger, 31 Penn. St., 295; Dow vs. Chamberlain, 5 McLean, 281; Bayley vs. Bailey, 5 Gray, 505; Lane vs. Shears, 1 Wend., 433; Freidley vs. Hamilton, 17 S and R, 70; Shaw vs. Erskine, 42 Me., 371. Aside from these States, which treat an absolute deed with a simultaneous argree-

ment to reconvey for a certain sum at a particular date in the future, *per se* a mortgage, may be added the State of Vermont, and others to which we will hereafter refer. Chief Justice Shaw in the first case cited by this Court uses these words, upon which he decides the case: "It "has often been held that when, upon the conveyance of "an estate or interest in land there is a stipulation in the "deed itself or in any separate deed executed at the same "time, and constituting with the conveyance one transac- "tion, that the estate shall be re-conveyed, upon the pay- "ment of money such stipulation constitutes a defeasance "as much as if the words were "oncondition" or "pro- "vided however," etc. Taylor vs. Wild, 5 Mass., 109; "Carey vs. Rawson, 8 Id., 159. Scott vs. McFarland, 13, "Id., 310. This rule is most frequently applied to the case "of a conveyance in fee, but a conveyance for life or for "years falls within the same principle."

Hence it is we have Vermont, Maine, Massachusetts and Pennsylvania at that time holding that the deed and agreement to reconvey constitute *per se* a mortgage, while, as will be seen, Texas, Illinois, Wisconsin and Tennessee hold that they do not *per se* constitute a mortgage. This court when the question was directly before it for adjudication, Teal vs. Walker, 111 U. S., 247, referring to the former cases holding the transaction *per se* to

be a mortgage, uses this language: "It is clear upon "these authorities that the three deeds executed by Gold- "smith and Teal jointly, and the several deeds executed "by Goldsmith alone, on August 19th 1874, and the de- "feasance executed on that day by Hewett and Walker, "are to be construed together, and so construed they con- "stitute a mortgage given to secure a debt."

The Supreme Court of Montana, as will be seen by record book page 43, disapproved the doctrine laid down by the courts of last resort of Vermont, Maine, Minnesota, Michigan, Indiana, Kentucky, Massachusetts and Pennsylvania, holding that a deed and agreement to reconvey, being one transaction, were *per se* a mortgage, and adopted the doctrine announced by Texas, Wisconsin and Tennessee.

If *this* Court stands upon the principles announced by Chief Justice Shaw in Nugent vs. Riley and the other cases cited in support of it, the court erred in not granting the motion for a non-suit.

That a deed and agreement to reconvey for a certain sum at a specified time, constituting one transaction, are *per se* a mortgage, we cite:

"Teal vs. Walker, 111 U. S., bot. p. 246, top 247.
"Nugent vs. Riley, 1 Met., 117.
"Wilson vs. Shoenberger, 31 Penn. St., 295.
Preschbaker vs. Feaman, 32 Ill., 580.
Harbison vs. Lemon, 3 Blackford (Ind.,) 51.
Colewell vs. Woods, 3 Watts (Pa.,) 188.
Edrington vs. Harper, 3 J. J. Marshall (Ky.,) 353.
Edrington vs. Harper, 20 Am. Dec., 145.
Kelly vs. Leachman, 29 Pac, Rep., 849 (Idaho.,) decided May 18, 1892.

" Dow vs. Chamberlin, 5 McLean, 281.
" Bayley vs. Bailey, 5 Gray, 505.
" Lane vs. Shears, 1 Wend., 433.
" Freidley vs. Hamilton, 17 S. & R., 70.
" Shaw vs. Erskine, 43 Me., 371.
" Jeffreys vs. Hursh, 58 Mich., 246.
" Jeffreys vs. Hursh, 25 N. W. Rep., 176.
" Voss vs. Eller, 109 Indiana, 260.
" Voss vs. Eller, 10 N. W. Rep., 74.
" Bunker vs. Barron, 79 Maine, 62.
" Bunker vs. Barron, 8 Atlantic R., 253.
" Frey vs. Campbell, 3 S. W. Rep. (Ky.,) 368.
" Butman vs. James, 34 Minn., 547.
" Butman vs. James, 27 N. W. Rep., 66.
" 15 A. & E., Enc. of Law, p. 790, and cases cited under note 5.

The words resell, reconvey, repurchase, redeem and the like, " may be used indiscriminately to convey the " same meaning in transactions of this kind."

Robinson vs. Cropsey, 2 Edw. Ch., 146.
20 Am & Eng. Enc. of Law, 607.
Miller vs. Ratterman, 47 Ohio St., 141.

In keeping with the doctrine expressed in Teal vs. Walker, *supra*, by this Court and the foregoing decisions, may also be found the following:

Mr. Devlin, in his work on deeds, top page 407, lays down this doctrine: " When at the time of the ex- " ecution of an absolute conveyance a separate defeas-

"ance or *agreement to reconvey* is also executed, the "transaction at law will constitute a mortgage."

"When the deed and defeasance have been exe- "cuted and delivered at the same time, and form parts of "one transaction, the courts have universally considered "them as constituting a legal mortgage. Thus, in a "lease where the lessor acknowledges the receipt in ad- "vance of the stipulated rents of the leased premises "during the term, and in which the *lessee agrees to recon- "vey* upon the sum advanced as rents and interest "thereon, is a mortgage. The law presumes a legal "mortgage from the fact that the conveyance and de- "feasance are executed and agreed upon at the same "time." We also call the attention of the Court to notes 1 and 2, on page 407, Devlin on Deeds, in support of the doctrine here announced by him.

Mr. Jones, in his Treatise on Mortgages, section 244, says:

"At law an absolute deed and defeasance or *agree- "ment to reconvey* executed at the same time amount to a "mortgage. Such a deed and agreement to reconvey "the estate, upon the payment of a certain sum of money, "or upon the *performance of some other condition*, have "always been held to constitute a legal mertgage, if the "instruments were of the same date, or *were executed* and

"*delivered* at the same time and as one transaction." See also notes 1 and 2, cited in support of doctrine thus announced. Some time, it is true, there are exceptions to this rule, where, for instance, the defeasance rests in parol and oral evidence is necessary to establish the status, in which cases evidence of a personal promise to pay is considered by some courts as an element necessary to establish the relation of the mortgagor and mortgagee; in such case, where resort must be had to oral evidence, it should be clear and convincing. But we imagine the cases are scarce where the deed and defeasance are of equal dignity, express the *exact* sum to be paid to secure a reconveyance, execute at the *same time*, between the *same parties*, and with reference to the *same real estate*, that the two are not construed as if one instrument and declared to be a mortgage, especially in those States where the rights of the mortgagor have been expanded, and the policy of its legislation with reference to cutting off by restrictions or limitations as to time the equity of redemption to which we have heretofore referred.

Of course, if the deed and agreement to resell and reconvey are to be treated as a mortgage, then under the statutes of Montana, heretofore quoted, the lease, in so far as operating to convey the right of possession, is abso-

lutely void. The court instructed properly upon this point by giving instruction 8, page 31 of record. The true test would seem to be, did the vendor have a right to *redeem* at a given time, for a given sum, as a part of the transaction? If so, then in those States having a statute like Montana that equity of redemption cannot be disposed of except by foreclosure and sale.

Since the decision of this Court in Teal vs. Walker, and subsequent to the transaction now under consideration, the question again came up, in which other elements entered into the transaction, and this Court reached a different conclusion.

In Wallace vs. Johnson, 129 U. S., 58, et seq., rendered in 1888, the grantor had by deed "with general "warranty of title" conveyed to Wallace and Leighton certain premises, and on the same day the grantees executed to one Ford an agreement in writing giving *him* the option of purchasing the land in question upon the payment of a certain sum at a certain time, and the question arose whether the transaction constituted a mortgage. In deciding that question, destitute as it was of the elements present in this, the Court, on page 64, uses this language:

"A deed of lands, absolute in form, with *general* "*warranty* of title, and an agreement by the vendee to

"reconvey the property to the *vendor* or a *third person*, "upon his payment of a fixed sum within a specified "time, do not of themselves constitute a mortgage; nor "will they be held to operate as a mortgage, unless it is "clearly shown, either by parol evidence or by the at- "tending circumstances, such as the condition and rela- "tion of the parties, or gross inadequacy of the price, to "have been intended by the parties as a security for a "loan or an existing debt. Cadman vs. Peter, 118 U. S. "73, 80; Coyle vs. Davis, 116 U. S., 108; Howland vs. "Blake, 97 U. S., 624; Horbach vs. Hill, 112 U. S., 144. (Italics ours).

Now the deed before the Court in Wallace vs. Johnson, *supra* containing *covenants of warranty*, was made to one person, while the agreement for an option was to a third person, thereby in no way suggesting a right to redeem by the vendor. We do not claim that this transaction would *per se* constitute a mortgage. It does not present the principles, or call for a determination of the doctrines announced by the various decisions and law writers, where the conveyance was to a certain person, who, as a part of the same transaction, agreed to reconvey to *his grantor* upon the payment of a certain sum at a certain time. The distinction is too apparent to require further comment. If this Court had intended to

have announced a different doctrine than that established by the authorities quoted with approbation in Teal vs. Walker, 111 U. S., 242, it would in some way have referred to the fact, as the case is the first one contained in the brief of counsel, and to which the Court was cited. Nor do the decisions cited by the court which we have above quoted conflict with the case of Teal vs. Walker *supra* in so far as it is based upon the cases therein cited with approbation.

Again the Supreme Court of Montana has woefully misinterpreted the decisions of the courts of last resort of Michigan, Indiana and other States when it assumes that a deed and agreement to reconvey between the same parties for a sum certain at a given time, of the same date, do not *per se* constitute a mortgage.

In Jefferys vs. Hursh (1885) 58 Mich. 246, 25 N. W. Rep. 176, Judge Champlin, all the other Justices concurring, announces the doctrine in these words: "It is "now settled as well as any principle of law can be that "an absolute deed, with a bond or separate deed or de- "feasance or agreement, executed at the same time, to re- "convey the estate on payment of a certain sum of money "constitute a mortgage, if the instruments are of the same "date, or are executed and delivered at the same time, and

"as one transaction; and when this is the case it is a con-
"clusion of law that they constitute a mortgage."

To the same effect will be found Voss vs. Eller 109, Indiana 260. And so it is when the Supreme Court of Montana cite Texas, Michigan, Illinois, Wisconsin, Indiana and Tennessee as authority that a deed absolute on its face with an agreement to recovery to the same grantor at a time and for a sum certain constituting one transaction is not *per se* a mortgage, its premises are wrong, and it is supported only by Texas, Wisconsin and Tennessee. There is reason to doubt but that these States, if the question was now presented, would concur with those taking a different view of the subject.

Again while the decisions and authorities are numerous, that when the deed is absolute on its face, parol evidence is admissable to show that it is a mortgage, we have been unable to find any authorities, to the effect that, where the deed and defeasance or agreement to reconvey are *per se*, in legal contemplation a mortgage, oral evidence is admissable to show them to be a conditional sale, but on the contrary find that such evidence is not admissable for that purpose and cite the Court to the following authorities :

"When a conveyance and an agreement to reconvey
"on payment of a certain sum are on their face of even

"date, the transaction is necessarily a mortgage, and "parol evidence of a different understanding by the "parties, will not be received to convert it into a condi- "tional sale."

Jones, on Mortgages Sec. 248.
Kerr vs. Gilmore, 6, Watts, Pa. 405.
Brown vs. Nickle, 6, Pa. St. 390.
Voss vs. Eller, 109 Indiana 260.
Proctor vs. Cole 66, Indiana 576.
Reitenbaugh vs. Ludwick 31 Pa. St. 131.
Jefferys vs. Hursh 58 Mich. 246.
Devlin vs. Deeds Vol. 2, Sec 1144.

It is also held in Kunkle vs. Wolfersberger 6 Watts, 373, and approved in Reitenbaugh vs. Ludwick 31 Pa. St. 131 that a formal conveyance may be shown to be a mortgage by extrinsic proof, while a formal mortgage cannot be shown to be a conditional sale by the same means.

A thorough review of the decisions of the courts and law writers of this country impresses the reader with the great departure that has taken place from the older doctrines and precedents, with respect to the conveyance of real estate by way of security.

The inroads made upon the old established precedents, by the Courts of Chancery have undoubtedly led

to the enactment of statutes like those of Montana by which the policy of the State upon the subject has been declared.

A conveyance by absolute deed of real estate when given as a security, whether there be any personal obligation for a debt or not, when the right to re-purchase by the *grantor*, upon the payment of a given sum at a certain time, by an agreement at the same date, is treated as a mortgage, and does not permit the grantee to claim the property as his own upon a failure to pay, no matter how strong such purpose may be expressed in the agreement or otherwise. The old theory that the legal title passed and that the equity of redemption was at the disposal of the mortgagor without foreclosure, by which the quality of a conditional sale was imported into the transaction, no longer obtains.

The courts treat the conveyance and an agreement to reconvey *per se* as a security, because the grantee holds it as such for the money advanced, subject to the right to redeem. The decisions and policy of the legislation referred to only go so far as to shut off that feature of the agreement that seeks to allow the grantee to retain the property upon a failure to *repurchase* or *redeem* (these words being used interchangeably), without a foreclosure and sale. In other words, it recognizes the

transaction in so far as it operates as a security to the grantee, but does not permit him in addition thereto to get the property if the money is not punctually paid. If the money is paid as contemplated, the grantee has had the full benefit of his conveyance as a security. If the money is not paid, instead of getting the title in fee to the property so held, as expected, he is required under the policy of the law to sell out this right to repurchase or redeem. If the grantor be the person with whom the agreement to resell is made, it operates as a right to repurchase, *i. e.*, a right to redeem. If the agreement is with a third party, as in Wallace vs. Johnstone, it is simply an agreement to sell upon conditions and amounts to an option. The transaction in no way suggests the idea of a repurchase of the equity of redemption. If A pawns property with B, the possession is a security for the money advanced, whether a personal liability to repay is incurred or not; the right of A is to repurchase or redeem within a certain time. The right given by the pawnee to a third person under such circumstances is a mere option. If the policy of legislation prevents him from becoming the owner upon the expiration of the time for repurchase or redemption, it *per se* makes the transfer of the possession a bare security, and would require him to sell to divest the pawnor of the right to repurchase or redeem. It is so with reference to real property. The absolute

We cannot well conceive of the relation of mortgagor and mortgagee arising out of an agreement with a stranger to the title, so as to give *him* the right to repurchase or redeem, and yet, it is *this* relation alone that the statute attempts to regulate. If the vendor, under a defeasance, has a right to repurchase, it is a right to redeem; if a stranger to the title, it in no way connects itself with the idea of redemption, and is in itself only an option, while it is the right of redemption, and not the option, to which the prohibitory statute is directed. Hence, in the case of Wallace vs. Johnstone, the question is not presented as it was in Teal vs. Walker, *supra*. The one redeems; the other purchases. The one is the owner of the title and parts with it to raise money upon a conditional right to redeem; while the other is a stranger to the title, a bare volunteer, to whom no right of redemption could possibly attach, and to whom the statute in no way relates. As bearing directly upon this question we cite the following:

20 Am. & Eng. Enc. of Law, 611.
3 Pom. Eq. Jur., 208.
Lomax vs. Bird (1683,) 1 Vern., 182.
James vs. Biou, 3 Swanst., 237.
Grant vs. Duane, 9 Johns. (N. Y.,) 611.
Jones on Mortgages, 1055.
Harwood vs. Underwood, 28 Mich., 427.
Smith vs. Austin, 9 Mich., 465.
Sellwood vs. Gray, 11 Ore., 534.
Rapier vs. Gulf City Paper Co., 64 Ala., 330.
Powers vs. Golden Lumber Co., 43 Mich., 468.

It will also be noted that in cases where oral evi-

dence has been admitted at all it refers solely to the circumstances and surroundings, and not the contemporaneous conversations between the parties, so as to enable the Court to interpret the instruments, which is in direct keeping with the statutory provisions we have quoted. This leaves it a deduction to be made by the Court from the facts in construing the instruments, and brings it within the decisions of this court in Johnson vs. Towsley, 13 Wallace, 72, and divers other cases upon the same subject, wherein the Court applies the correct principles of law to the facts where erroneous principles have been applied. Hence, under the decisions, which allow an interpretation of the instrument from oral testimony, the Court will pronounce upon the legal results from it. Here it is, undisputed: First. That plaintiff in error was financially involved, and his property mortgaged. Second. That the application was for a loan. Third. That the consideration advanced was grossly inadequate to the value of the property. Fourth. That the money was obtained to discharge leins and claims against the same. Fifth. That the amount advanced comprised the amount loaned, with interest upon it, up to the time the right was given to repurchase. Sixth. That the plaintiff grantor continued to remain in possession of the property. Seventh. That the agreement for a resale or repurchase was a part of the same transaction in writing, and executed at the same time, which, under the existing facts and all of the authorities, we submit, constituted it a mortgage, if extrinsic facts are to be resorted to at all.

conveyance and defeasance or agreement to permit a repurchase or redemption cannot become absolute upon a failure to repurchase or redeem, no difference what words, instrument or device is used to accomplish it. The transaction would be opposed to the policy of the State, and on that account would not be recognized or upheld, as was said by the court in Teal vs. Walker, *supra.* See 27a

Upon the second branch of the non-suit this additional question is presented. Besides showing by the deeds and agreement to *resell* and *reconvey* to the grantor that the transaction was a mortgage and that there was nothing therefore to support the lease, defendant went further and proved that the grantor remained in possession, that the reasonable value of the rents and profits of the property was $450.00 to $500.00 per month, and introduced no testimony to show that the grantor ever entered or held under the lease.

See record, page 11, 12 and 13.

In this they established three facts upon which the court could interpret the transaction aside from the legal inferences from the writings themselves.

First. That the grantor remained in possession.

Second. That the rents provided for were *grossly* inadequate to the value thereof.

Third. That there was no evidence that the grantor ever entered or held under the lease.

It would seem manifest that if defendants, the grantees, were entitled to possession of the premises against plaintiff, the grantor, under the deed and agreement, they would be entitled to the reasonable value for the use and occupation of the premises, and that the *grossly* inadequate consideration expressed in the lease in connection with the deed and defeasance, together with the occupation of the premises by the grantor, would enable the court to pronounce the transaction a mortgage and not a conditional sale, if any evidence *aliunde* the writings was required.

II.

The second assignment of errors includes the ruling of the court as to the admission of evidence after the motion for a nonsuit, had been overruled, and the trial has proceeded. DeWolf was the attorney who drew up the deed, defeasance and lease for the parties, which was done in their presence in his office in Butte City, Montana. Henry Gassert, one of the defendants in error, being a witness upon the stand and interrogated by said attorney, was asked this question:

"State what conversation took place at my (De-
"Wolf's) office *at the time* these *deeds* and this *contract*
"*to reconvey* was made?"

"Objected to by counsel for defendant for the
"reason that said question would call forth and elicit
"incompetent, irrelevant and immaterial testimony; which
"objection was by the court overruled, and defendant
"then and there duly excepted to said last ruling of the
"court."

See record, bottom page 26.

Here was an incompetent question, and calculated to elicit incompetent and damaging testimony to plaintiff. Although counsel for plaintiff also moved the court to strike out the testimony given in response to this question, it will not, we apprehend, be claimed that this waived the objection and exception above recited. The witness, as will be seen by reference to record, p. 27, proceeded to detail the conversation had at and before the execution of the deed and defeasance. Its injurious effect if incompetent is too apparent to require comment.

At the time of this transaction, and ever since, the following statutes of the State of Montana were in force. Sec. 628, p. 224, C. S. of M: "When the terms of an "agreement have been reduced to writing by the parties,

"it is to be considered as containing all those terms, and "therefore there can be *between the parties*, and their "representatives or successors in interest, no evidence "of the terms of the agreement other than the contents "of the writing, except in the following cases:

"*First:* Where a mistake or imperfection of the "writing is put in issue by the pleadings.

"*Second:* Where the validityof the agreement is "the fact in dispute.

"But this section does not exclude other evidence of "the *circumstances* under which the agreement was made "or to which it relates, as defined in section 632, or to "explain an extrinsic ambiguity, or to establish illegality "or fraud. The term agreement includes deeds and "wills, as well as contracts between parties."

There is no pretense here that there is any *mistake* in what is expressed in the instrument, or any *imperfection* therein by which something has been inadvertently omitted, nor are any such issues presented by the pleadings, and the validity of the agreement is not a fact in dispute.

Section 632 is as follows: "For the proper con- "struction of an instrument, *the circumstances under* "*which it was made, including the situation of the subject*

"*of the instrument* and *of the parties to it may also be* "*shown*, so that the *Judge* be placed in the position of "those whose language he is to interpret." (Italics ours.)

Three rudimental propositions are here announced:

First: That all contemporaneous conversations are excluded.

Second: That the circumstances, subject matter and situation of the parties, may be given in evidence.

Third: That the duty of interpreting the agreements or writings from these and the language used *devolves* upon the *Judge*.

This statute but expresses the doctrines of the common law upon the subject, which is so familiar to the bench and bar as to forbid the propriety of citing authorities in support of them. Besides it is a statute, and must be considered as defining the rule applicable here. Hence the exception, whether considered under the objection to the incompetent interrogatory or motion to strike out the incompetent evidence given under it, was a manifest error and fatal to the case of defendants. Besides this, evidence was given to the jury, and aside from its incompetency for any purpose was certainly not properly before it. It was not the province of the jury,

as we have seen, to interpret these instruments with or without the aid of extrinsic evidence. If competent for any purpose it could only be to aid the *Judge* under the statute in giving the agreement a judicial construction.

If any portion of the testimony was competent, for any purpose, its consideration is expressly limited to the functions of the Judge, and any other rule would place the whole trial and proceedings had upon the wrong theory, which, if for no other reason, the case would be reversed. Whatever view is taken of this matter, we respectfully submit that the error in admitting this evidence cannot be disregarded upon legal principles. Injury is conclusively presumed from an error like this, as it is impossible to ascertain the influence this incompetent evidence may have had upon the minds of the jury.

In Jones on Mortgages, Vol. I, section 248, we find: "When the conveyance and the agreement to re-"convey on payment of the purchase money are on their "face of even date, the transaction is necessarily a mort-"gage, and parol evidence of a different understanding "by the parties will not be received to convert it into a "conditional sale."

To the same effect are:

Kerr vs. Gilmore, 6 Watts (Pa.,) 405.
Brown vs. Nickle, 6 Pa. St., 390.

Voss vs. Eller, 109 Ind., 260.
Procter vs. Cole, 66 Ind., 576.
Reitensbaugh vs. Ludwick, 31 Pa. St., 131.
Jeffreys vs. Hursh, 58 Mich., 246.
Devlin on Deeds, Vol. II, Sec. 1144.

In Clark vs. Woodruff, 51 N. W. Rep., 359 (Mich.,) Morse, C. J., in speaking of the equitable docrines, even in the absence of a statute like ours, says:

"A deed with a bond or agreement to reconvey the "estate upon payment of a certain sum of money, or "upon the performance of some other condition, has al- "ways been held to constitute a legal mortgage, if the "instruments are of the same date, or are executed and "delivered at the same time and as one transaction. "When the deed and defeasance are executed at the "same time, it is a conclusion of law, in the absence of "any proof showing an intent to the contrary, that they "constitute a mortgage. 2 Jones Mortg., 244. In "Batty vs. Snook, *supra*, the contract, as in this case, "undertook to make the time of performance as of the "essence of the contract, and material. It was also ex- "pressly a condition in that case that the contract should "be the same as an original contract for the convey- "ance of land, and that, if complainant failed in any par- "ticlar in complying with the contract, he should have

"no rights either at law or in equity, in the premises. "It was decreed, however, to be a mortgage, and the "court said: 'Once a mortgage, always a mortgage,' "may be regarded as a maxim of the court. Equity is "jealous of all contracts between mortgagor and mort- "gagee by which the equity of redemption is to be "shortened or cut off. The mortgagor may release the "equity of redemption to the mortgagee for a good and "valuable consideration, when done voluntarily, and there "is no fraud and no undue influence brought to bear "upon him for that purpose by the creditor. But it can- "not be done by a contemporaneous or subsequent ex- "ecutory contract, by which the equity of redemption "is to be forfeited if the mortgage debt is not paid on "the day stated in such contract, without an abandon- "ment by the court of those equitable principles it has "ever acted on in relieving against the penalties and for- "feitures."

If the conversations were incompetent the interrogatory was certainly improper. It called for nothing but the conversations at the time of making the deed and agreement, and anything else said by the witness was not responsive, which subjected the entire answer to the motion to strike out.

But we claim that, under the Statute of Montana, all

extrinsic evidence for the purpose of showing the intention of the parties was incompetent, and, instead of aiding the cause of defendants, rendered the transaction more obnoxious to the policy of our legislation. Recurring again upon this point to the statute we find that a mortgage of real property shall not be deemed a *conveyance whatever may be its terms*, so as to enable the mortgagee to recover possession without foreclosure and sale. So that whatever be the intent, and however aptly expressed, it cannot prevail if it is once settled that the transaction is a mortgage. The authorities concur upon the proposition that under the rule in this country a mortgage is a bare security, and the statutes we have *cited expressly* make it so. Hence if the transaction under the deeds and agreement to resell and reconvey are a security for the sum specified, then it is impossible by any language or device to dispense with the right to repurchase no difference in what way the intention so to do may be expressed, whether in the agreement or verbally at or before the time it is made. We shall assume for the present that no personal liability is necessary to pay this specified sum, but that the conveyance of the property as a security is all sufficient to constitute a mortgage without it. It is clear that all this was done that the debt against the property might be discharged at the time mentioned, and if reconveyed it would have been held only

in the capacity of a security for the debt against it. But it is claimed that the agreement was that if it was not repurchased or redeemed at the time specified the grantee was to become the owner and this property, held up to that time as a security, and subject to be repurchased or redeemed, became absolutely the property of the grantee without foreclosure and sale, and here comes the rub. If a *mortgage* is a *security* and this is a *security*, no difference what else is attached to it, or what other characteristics may be imported into it, it is still a mortgage in the sense that there must be a foreclosure and sale. The statute says that no language used can change it in *that* respect so as to dispense with the foreclosure and sale. Until this is done it always remains a security and consequently a mortgage.

Now it is conceded here that Bogk deeded to Gassert and others, and that Gassert and others, according to arrangements, gave Bogk back an agreement to resell and reconvey upon the payment of the sum specified at the time fixed, but it is claimed that this property so deeded to them upon these conditions if the money is not paid at the time fixed becomes theirs absolutely. The agreement to resell and reconvey on the part of Gassert and others created a corresponding right to *repurchase* and redeem on the part of Bogk, and the question is can this equity of redemption be cut off in any way except

that provided by the statute? At common law the mortgage carried the legal title, and there was left in the mortgagor just what is sought to be left in him here, the right to redeem by the payment of the specified sum at the time fixed, and if he fails to do so let the agreement operate to shut out this right. The case, as we have said before, is on all fours with that of a pawn. When the possession of the thing is delivered and money advanced upon the strength of it, with the agreement that unless the amount agreed upon was paid at the time fixed, the thing under the arrangement was to become the property of the pawnee. Should the laws of the State interpose and require a sale before the rights of the pawnor could be extinguished, it could not well be asserted that the agreement would prevail, notwithstanding the law, no difference how aptly the intention of the parties were expressed; yet when we get at the bottom of it this is just what is claimed here. Under the statute the conveyance of the real estate satisfied the delivery, as in case of a pawn, and the whole question is solved by inhibiting the right to possess the property conveyed without foreclosure and sale. And so it is, the motion, aside from the *error* in allowing the question to be propounded and answered detailing the conversation, should have been sustained, as the intention of the parties, however well expressed, could not be made available to dispense

with plaintiff's right to redeem under the statute, and invest the defendants with a right of possession without foreclosure and sale. Hence it is some of the principal questions involved are raised by the motion for non-suit and motion to strike out the oral testimony aside from the instructions. We will not stop to argue the proposition that, even if the intention of a party is the proper subject-matter of inquiry, and the party on account of being a witness on his own behalf may be permitted to testify as to his intention, that under the statute which limits the evidence in interpreting a contract or agreement to the situation of the parties and surroundings, contemporaneous conversations on that account could be admitted. Indeed it would be a novel way of interpreting a contract to take the testimony of the respective parties as to their intention in the matter. We would usually find just what we find here, that they did not intend the same thing, and that the mistake, or whatever it may be called, was not mutual.

The law makers seemed to fear that the language used was too strong to admit evidence of the *circumstances* under which the agreement was made, and as a precautionary measure said : " But this section does not "exclude other evidence of the circumstances under "which the agreement was made, or to which it relates."

Section 628 *supra*. For the reasons stated we respectfully submit that the conversations should not have been admitted and should have been excluded, and that all evidence by which the deeds and agreements were attempted to be raised to the dignity of a conveyance of the fee and deprived of the characteristics of a security was equally as inadmissible.

If, however, evidence of the "circumstances under "which it was made, including the situation of the sub-"ject of the instrument and parties to it, may be shown, "so that the *Judge* be placed in the position of those "whose language he is to interpret," it was a matter for the Judge to consider in interpreting the deed and agreement, if this court is of the opinion that the same, taken together, do not constitute in law a mortgage. It does not become a question of sufficiency of evidence, but a question of law deducible from those facts properly in evidence before the Judge, was the proposition freed from the statutory provision, to which we have heretofore referred, and dependent upon extrinsic proof.

The following circumstances, etc., are in evidence and uncontroverted, if the theory of defendants in error is to prevail, and in legal contemplation fixes upon the transaction the indicia of a mortgage.

First: The consideration is so grossly inadequate

as to shock the conscience of a just man and avoid the deed, much less reduce it to a mortgage under the agreement, if the two left it equivocal, as is held by some courts. We speak from the record when we say that the lowest valuation of the deeded property, under all and any of the testimony, places it at forty thousand dollars, and the highest, being a preponderance of such evidence, at fifty thousand. The negotiations, commencing in a loan, were for fifteen thousand dollars, which was all that was advanced by defendants. See record, top p. 21. Interest up to the time agreed upon for a repurchase or redemption was computed at the unconscionable rate of one and one-half per cent. per month, compounded monthly. See record, page 18. Hence we have defendants, according to their theory, purchasing property, under the evidence, of the value of $45,000 for $15,000.

Defendants had a mortgage upon the property of plaintiff; he was distressed, and, in his language, was foreclosed; the judgments and indebtednesses against the property amounted to about $15,000. Under this condition of things he applied to defendants for a loan, not to sell; they claim that they refused to take a mortgage, but agreed to take the deed and defeasance introduced in evidence. While the gross inadequacy of the consid-

eration is of itself so shocking to the conscience as to avoid the deed, the above circumstances would justify the court in doing so in an action brought for that purpose. The weakness and necessity of the vendor would enter fairly into the consideration of the question in such an action and would certainly control the effect to be given to the deed and agreement if any uncertainty attached to the same, and characterize it as a mortgage. Any slight circumstance indicating unfairness would vitiate the deed, as will be seen from the following authorities. Why then should it not control the *Judge* in construing the deeds and agreement under the statute we have quoted?

2 Pom. Eq. Juris., Sec. 927 (and note), 928 and 949.
2 Pom. Eq. Juris., Sec. 901, and note.
1 Story Eq. Juris., Sec. 901, and note.
1 Brown Chanc. R., Marg., p. 6.
Kerr on Fraud and Mistake, p. 98, 187.
3 Waite's Actions and Def., p. 432.
5 Waite's Actions and Def., p. 517.
Martlatt vs. Warwick, 3 C. E. Green (N. J.), 108.
Butler vs. Haskell, 4 Dessausure (S. C.), 651.
Morris vs. Philips, 30 Mo., 145.
Price vs. Martin, 46 Miss., 489.
Twistleton vs. Griffith, 1 P. Wm's., 310.
Clarkson vs. Humway, 2 P. Wm's., 203.
Osgood vs. Franklin, 2 Johns Ch., p. 1.
Whelan vs. Whelan, 3 Cowen, 571.

Tate vs. Williamson, 2 Ch. App. Cases, 55.
Smith vs. Bentley, 2 Ired. (N. C.) Eq., 456.
Matthews vs. Bliss, 22 Pick., 48.

The conversation being incompetent, and the Judge being the one charged with the duty of interpreting the deeds and agreement from the "circumstances under "which it was made, including the situation of the subject "of the instrument and parties to it," those circumstances, without any conflict in the evidence, consist of the following facts:

First. That plaintiff in error was financially involved, that defendants had a mortgage upon his property and he applied to them for a loan.

Second. That they refused to take a mortgage but agreed to take the deed and defeasance.

Third. That the consideration advanced was *grossly* inadequate to the value of the property, the amount advanced being $15,000.00, and the value of the property being from $40,000.00 to $50,000.00.

Fourth. That the money was obtained not to leave the county upon or to embark in business, but to discharge the claims against the property.

Fifth. That the plaintiff, notwithstanding the deed, continued to remain in possession of the property.

Sixth. That interest was computed upon the money advanced, and such interest, up to the date of the time allowed to repurchase or redeem with the amount advanced, comprised the amount for which the repurchase or redemption could be made.

Seventh. There was a right given to repurchase or redeem at the time the deeds were agreed upon and executed, in writing, and constituted one contemporaneous transaction upon repaying the amount advanced and interest.

This constitutes the evidence and the question is, as matter of law, are the deeds and defeasance under such circumstances to be interpreted by the *Judge* as a conditional sale or a mortgage?

Under those statutes and in those courts where extrinsic evidence is admissible to enable the court to interpret the deeds and agreement to resell and reconvey, securing a right to repurchase or redeem, the following are regarded as the indicia upon which the court determines whether the transaction was a mortgage or a conditional sale.

First: Did the negotiations commence for a loan?

Morris vs. Nixon, 1 Howard U. S., 118.
Holmes vs. Grant, 8 Paige Ch., 243.

15 Am. & Eng. Enc. of Law, p. 781.
Horn vs. Keteltas, 46 N. Y., 605.
Feilder vs. Darrin, 50 N. Y., 438.
King vs. Newman, 2 Munf. (Va.), 40.
Robertson vs. Campbell, 2 Call. (Va.), 354.
Davis vs. Demming, 12 W. Va., 246.

Second: Was the consideration advanced a fair and reasonable value of the property conveyed?

Jones on Mortgages, Sec. 275.
Thornborough vs. Baker, 3 Swanst, 628, 631.
Davis vs. Thomas, 1 Russ. & M., 506.
Williams vs. Owen, 5 M. & C., 303.
Douglas vs. Culverwell, 3 Gif., 251.
Langton vs. Horton, 5 Beav., 9.
Russel vs. Southard, 12 How., 139.
Pearson vs. Seay, 35 Ala., 612.
Crews vs. Treadgell, 35 Ala., 334.
Rue vs. Dole, 107, 111, 275.
Turpie vs. Lowe, 15 N. E. Rep., 834.
Davis vs. Stonestreet, 4 Ind., 101.
Bridges vs. Linder, 60 Ia., 190.
Reed vs. Reed, 75 Me., 264.
Thomson vs. Banks, 2 Md. Ch., 430.
Campbell vs. Dearborn, 109 Mass., 130., 144.
Freeman vs. Wilson, 51 Miss., 329.
Brown vs. Dewey, 2 Barb., 28.
Steele vs. Black, 3 Jones Eq., 427.
Streeter vs. Jones, 3 Hawk., 423.
Sellers vs. Stalcup, 7 Ired. Eq., 13.

Kemp vs Earp, Id. 167.
Wharf vs. Howell, 5 Binn., 499.
15 Am. & Eng. Enc. of Law, 718, and cases cited in note 10.

In Russell vs. Southard, 12 Howard, 139, the Supreme Court of the United States said: (Curtis, J.) "The deed and memorandum certainly import a sale; "the question is, if their form and terms were not "adopted to veil a transaction different in reality from "the appearance it assumed? In examining this ques- "tion it is of great importance to enquire whether "the consideration was adequate to induce a sale. "When no fraud is practiced, and no inequitable "advantage is taken of pressing wants owners of prop- "erty do not sell it for a consideration manifestly in- "adequate, and, therefore, in cases on this subject, great "stress is justly laid upon the fact that what is alleged to "have been the price bore no proportion to the value of "the thing said to be sold."

Third: Was there an agreement to reconvey in writing, in addition to the inadequacy of the amount advanced?

Jones on Mortgages, Sec. 329.
Davis vs. Stonestreet, 4 Ind., 101.
Turpie vs. Lowe (Ind.,) 15 N. E. Rep., 834.
Wilson vs. Patrick, 34 Iowa, 362.

Trucks vs. Lindsey, 18 Ia., 504.
West vs. Hindsy, 28 Ala., 226.
Crews vs. Treadgill, 35 Ala., 334.
Overton vs. Bigelow, 3 Yerg. (Tenn.,) 513.
Gibbs vs. Penny, 43 Texas, 560.
Matthews vs. Porter, 16 Fla., 466, 487.
Klein vs- McNamara, 54 Miss., 90.
Davis vs. Demming, 12 W. Va., 246.
Lawrence vs. Dubois, 16 W. Va., 443.
Vangilder vs. Hoffman, 22 W. Va., 1.
Kerr vs. Hill, 27 W. Va., 576, 598.
Huscheon vs. Huscheon, 12 Pac. R., 410-
Turner vs. Wilkinson, 72 Ala., 461.
Helm vs. Boyd (Ill.,) 16 N. E. Rep., 85.

Fourth. Did the grantor remain in possession after the conveyance?

Jones on Mortgages, Sec. 274.
Ransen vs. Frayson, 10 Leigh (Va.,) 592.
Gibson vs. Eller, 13 Ind., 174.
Clarke vs. Finlah, 90 Ill., 245.
Jones on Mortgages, Sec. 600.
Hoffman vs. Ryan, 21 W. Va., 430.
Thompson vs. Davenport, 1 Wash. (Va.) 125.
Bennatt vs. Holt, 2 Yerg., 6.
15 Am. & Eng. Enc. of Law, p. 781.

For, as was said by the court in the West Virginia case, "If the vendor remains in possession of lands after "the alleged sale, this is a circumstance that tends to

" show that it was not really a sale but a mortgage, for " such a conditional possession in the vendor after a sale, if " not inconsistent with a sale, is an unusual accompani- " ment of it."

The cases go so far as to hold that even where there is an absolute deed and no agreement for a repurchase or redemption, the continued possession of the grantor is evidence tending to show that the conveyance was a mortgage.

Jones on Mortgages, Sec. 328.
Crews vs. Treadhill, 35 Ala., 334.
Dausenspeck vs. Platt, 22 Cal., 330.
Strong vs. Shea, 83 Ill., 575.
Thompson vs. Band, 2 Md. Ch., 430.
Campbell vs. Dearborn, 109 Mass., 130, 145.
Steele vs. Black, 3 Jones Eq., 427.
Streator vs. Jones, 3 Hawks, 423.
Sellers vs. Stalcup, 7 Ired. (Eq.), 13.
Kemp vs. Earp, Id., 167.
Ruffer vs. Wommack, 30 Tex., 332.
Wright vs. Bates, 13 Vt., 341.
Edwards vs. Hall, 79 Va., 321.
Davis vs. Demimng, 12 W. Va., 246.
Lawrence vs. Dubois, 16 W. Va., 443.
Hoffman vs. Ryan, 21 W. Va., 415.
Matheny vs. Sandford, 26 W. Va., 386.
Kerr vs. Hill, 27 W. Va., 576, 598.
Lincoln vs. Wright, 4 De Gex & J., 16.
Cotterell vs. Purchase, Cas. Temp. Talbot, 61.

Fifth: Was interest paid or to be paid on the money advanced?

Coote on Mortgages, 4 Ed., p. 22.
Allendy vs. Dalton, 5. L. J. K. B., 312.
Farmer vs. Gross, 42 Cal., 169.
Honore vs. Hutchins, 8 Bush, Ky., 687.
Turpie vs. Lomie, 15 N. E. Rep., 834.

We have been unable to find any case where all the foregoing indicia concur in pronouncing the transaction a mortgage, as they do in this case. In most of them two or more alone combine, as in Morris vs. Nixon, 1 Howard, U. S., 118, Holmes vs. Grant, 8 Paige Ch., 243, when the court held the transaction a mortgage on account of the inadequacy of the price and the negotiations commencing with a loan.

Besides, in this case, if a personal liability was required, the transaction raised an implied promise to pay the money advanced.

Montgomery vs. Spect, 55 California, 356.
Brinkman vs. Jones, 44 Wis., 514.
Hughes vs. Edwards, 9 Wheaton, U. S., 489.

The record in this case shows interest was computed upon the exact amount advanced by defendants, up to the date at which plaintiff had the right, under the

defeasance, to repurchase and redeem the deeded property. While there is no express agreement by which a personal liability attached, this fact of itself is insufficient to show that the money to be paid was not a debt against the property.

But the authorities place it beyond any question that the personal liability of the mortgagor for the debt is not necessary in order to constitute the transaction in question a mortgage. In Russell vs. Southard, 12 Howard, 139–152, Curtis, Judge, uses this language: "It has "been made a question, indeed, whether the absence of "the personal liability of the grantor to repay the money "be a conclusive test to determine whether the convey- "ance was a mortgage. In Brown vs. Dewey, 1 Sandf. "Ch. R., 56, the cases are reviewed and the result ar- "rived at that *it is not conclusive.*"

The Supreme Court of the State of California, having the same question under consideration in Hickox vs. Lowe, 10 Cal,. 197, 210, speaking through Justice Field, says: "There is no force in the objection that it does "not appear upon the face of the papers that there "was any personal obligation on the part of Hickox to "pay the amount of the principal and interest. Such "obligation would only enable the mortgagee to look to "the mortgagor for any deficiency remaining after the

"application of the proceeds of the sale of the premises "to the payment of the sum secured. In the case where "the question has arisen whether the transaction was "one of purchase or of security, there could not have "been a personal obligation, distinct from the convey- "ance, as such fact would have determined conclusively "the character of the transaction. The only object in "taking a personal obligation is to provide against the "contingency that the proceeds arising upon the sale of "the property may not be sufficient to satisfy the debt. "No end could be obtained by requiring such obligation "where the value of the property pledged greatly ex- "ceeds the debt. It is in these cases that the personal "obligation is likely to be omitted, and it is in these "cases that the equity of redemption is evidently much "the strongest."

In this case, as we have seen, the gross inadequacy of the price renders the equity of redemption of the greatest importance, and the enormous interest charged upon the same places it beyond the range of the possibility of defendants suffering any injury by declaring the transaction a mortgage. In Rice vs. Rice, 4 Pick., 439, Parson, Chief Justice, says: "It is not the less a mort- "gage because there was no collateral personal security "for the debt.

In DeCamp vs. Crane, 4 C. E. Green, N. J., 166, 172, Zabriski, Chancellor, says: "But I am not willing "to say that there can be no mortgage without a debt, "or someone being bound at all events to pay the "money."

If it were a fact that there is no personal liability created on the part of the grantor, there was nevertheless a debt or liability imposed upon the land conveyed, which, according to the terms of the agrement, could be discharged by paying a specified sum within a certain time. And this is all that is necessary under the authorities to constitute a mortgage. We cite the court to the following.

4 Kent, 12th Ed., bot. pg. 145, top pg. 146.
Montgomery vs. Spect, 55 Cal., 356.
2 Wash. on Real Prop., 3 Ed., top. pg. 48, note 1.
Youle vs. Richard, 1 Saxon N. J., 537 and 8.
DeCamp vs. Crane, 4 C. E. Green, N. J., 171 and 2.
Russell vs. Southard, 12 Howard, U. S. 139.
24 Minn., 105.
Flagg vs. Mann (Story J.), 2 Sumner, 533.
Campbell vs. Dearborn, 109 Mass., 144.
Campbell vs. Dearborn, 12 Am. Rep., 671.
Morris vs. Budlong, 78 N. Y., 543.
Hickox vs. Lowe (Field J.), 10 Cal., 197.
1 Allen, 107.
Jones on Mortgages, 1st Vol., Sec. 272.
Approved in 107 Ill., top pg. 283.

Bratwright vs. Peck, 33 Texas, 68.
Plato vs. Rae, 14 Wis., 490.
Graham vs. Stevens, 34 Vt., 166.
Graham vs. Stevens, 80 Ala. Dec., 675.
Desmond vs. Cray, 9 Fed. Rep., 750.
Brinkman vs. Jones, 44 Wis., 514.
Washburne on R. P., 3 Ed., 49 and 50, No. 2.
Carr vs. Carr, 52 N. Y., 251.
65 Ala. 382.
Third Pomeroy Eq., in Secs. 175 and 6 and notes, and many other cases in notes of these cases, showing few, if any, to support instruction.

In Russell vs. Southard, 12 Howard, 139 *supra*, the court in discussing this question uses this language:

"In examining this question, it is of great import-
" ance to enquire whether the consideration was adequate
" to induce a sale. When no fraud is practiced, and no
" inequitable advantages taken of pressing wants, owners
" of property do not sell it for a consideration manifestly
" inadequate, and therefore, in the cases on this subject,
" great stress is justly laid upon the fact that what is
" alleged to have been the price bore no proportion to
" the value of the things said to have been sold; citing
" Conway vs. Alexander, 7 Cranch, 341; Morris vs.
" Nixon, 1 How., 126; Vernon vs. Bethel, 2 Eden, 110;
" Oldham vs. Halley, 2 J. J. Marsh, 114; Edrington vs.
" Harper, 3 J. J. Marsh, 354."

And the Supreme Court of California in Huscheson vs. Huscheson, 12 Pacific Reporter, 412, 71 Cal. 407, after adopting this doctrine, in applying it to the case before them use this language:

"Tested by the foregoing rules of law, was the "deed in question an absolute conveyance or a mort- "gage? It is not pretended that the value of the prop- "erty, when the deed was made, was less than $4,000.00, "nor that there was any consideration for its execution, "except an agreement on the part of the defendant to "pay all of plaintiff's debts, including all claims then in "litigation, or that might be brought against him. The "amount to be paid on the Fitzgerald note was known "to be only a little more than $500.00. The only other "debt was the Comise claim, which was uncertain in "amount; it might be nothing, or might be several "hundred dollars. Taking both of the claims together, "we are unable to see how it could have been anticipated "that the defendant would be called upon to pay more "than a thousand or twelve hundred dollars. The con- "sideration for the deed was, then, altogether inadequate, "and it seems quite incredible that plaintiff would be "willing to sell out all his property, even to his brother, "for about one-fourth of its value."

In Campbell vs. Dearborn, 109 Mass., 130, same case,

12 Am. Rep., 671, Wells, Judge, said: "A mortgage "may exist without any debt or other personal liability "of the mortgagor. If there is a large margin between "the debt or sum advanced and the value of the land "conveyed, that in itself is an assurance of payment "stronger than any promise or bond of a necessitous "borrower or debtor. Hence the inadequacy of price, in "such a case, becomes an important element in establish-"ing the character of the transaction."

In Glover vs. Payn, 19 Wend., 521, cited with approval in Brown vs. Dewey, 1 Sandford, Ch. Rep., p. 71, Bronson, J., uses the following language: "That the "test insisted upon cannot be decisive is manifest from "this, that it is not a necessary ingredient to constitute a "mortgage, that the creditor should have a remedy "against the person of the debtor. We not unfre-"quently see mortgages without any accompanying obli-"gation or contract for the payment of the debt."

We might, however, cite additional authorities to the effect that the memoranda contained in the record, p. 22, showing the amount of plaintiff's indebtedness in connection with the payment and advance to plaintiff of the $15,000, in the absence of an agreement that no personal liability should attach within itself, would support an action of assumpsit. In Russell vs. Southard, supra,

in speaking of this matter, this Court says: "Because, "we are of opinion in this case there is sufficient evidence "that the relation of debtor and creditor was actually "created, and that the written memoranda contains the "amount of the debt, though it contains no written "promise to pay it. In such a case it is settled that an "action of assumpsit will lie. Tilson vs. Worwick, Gas "Light Co., 4 B. & C., 968. Yates vs. Aston, 4 Ad. & "El. N. S., 182. Bennett vs. Lynch, 5 B. & C., 589. El-"der vs. Rouse, 15 Wend, 218."

It would seem useless to augment authorities upon the proposition that no personal liability is necessary, and that in those cases and courts where oral evidence is admissible showing the circumstances under which the deeds and agreement were executed, that under the facts in this case they should be declared by the *Judge* to be a mortgage.

But it is asserted by the Supreme Court of Montana, that unless there is a personal liability of the grantor in the deed, there is wanting the element of mutuality, and that on this account the transaction cannot be a mortgage, and is of necessity a conditional sale. In this we respectfully submit this position of the court is not sustained by the law upon the subject. One and one-half per cent per month, compounded monthly, was com-

puted upon the money advanced upon the property, with the right of plaintiff to repurchase or redeem the same upon the payment of the amount thus ascertained at a given time. The want of mutuality seems to exist in the fact that defendants are not permitted to retain the property without a foreclosure and sale, and thereby acquire about $50,000 in value for an advance of $15,000. If the parties, instead of expressing it in the way they left it, had contracted to the effect that the grantee considered the granted premises ample security without any personal liability of the grantor, and that if the money was not refunded at the time agreed upon the grantor waived a foreclosure and sale, and the title thus far held as a security should become a fee without foreclosure and sale. The latter part is contrary to the policy of the laws of Montana, as we have seen, and is void. It does not destroy that part of the agreement by which the grantee holds the land as a security, but requires the grantee to foreclose and sell.

The sum and substance of the agreement was that the grantee would hold the land as a security until the party repurchased or redeemed, if done within the time; if not, the title so held was to become absolute and without conditions. The latter part, being contrary to law, the violator of it escapes easily enough by being per-

all being witnesses on the part of the defendants in error, making an even greater inadequacy than the amount for which it is claimed the conditional sale was made. Two witnesses alone testify as to the purposes of this lease, being the plaintiff in error, and Steele, one of the defendants in error. Plaintiff testifies emphatically that it was given to secure the payment of the representation of the mines and taxes, estimated at $450, *which he paid.* Steele is the only other witness testifying upon the point, who says: "After the deed and the contract to recon-"vey in a year was completed there was a lease drawn "by you (witness here referring to and addressing Mr. "De Wolf, one of plaintiff's counsel,) for the nominal sum "of one dollar. A day or two after this we thought it "was fair for us that the taxes should be paid on this "property, providing Bogk repurchased the property in "one year, and, without we made some arrangement for "it, it would come out of our own pocket, and the repre-"senting of the two claims, and we went to your office "the second time and talked this over, and Bogk agreed "to give us so much money provided he rebought it; so "we made out a new lease covering money enough to "pay the taxes and represent these two claims, and "Bogk signed it, and it was agreeable to all parties."

It is manifest that the lease was executed as a

case of default, was by foreclosure and sale. But it was not only a mortgage, and intended as such, except, perhaps, in so far as the unconscionable purpose contemplated by defendant of using it as a means of acquiring possession, but its real purpose had been subserved and the money paid in accordance therewith. It is not disputed but that the $17,935 comprised the amount of plaintiff's indebtedness, including interest from the date of the agreement at 1½ per cent. per month, compounded monthly up to the 19th day of May, 1886, the time fixed within which a repurchase or redemption might be made. Hence, instead of possession or *right* of possession during this time, or in lieu of rent, the defendants received *interest* at 1½ per cent. per month, compounded monthly, during the period fixed for redemption. They were not, therefore, in fact, entitled to rents or possession, and during this period we must look for the instrument sought to be made available as a lease to perform some other office. Again, the lease, as it is termed, purports to be for rents and profits of the devised premises during the time allowed for the repurchase or redemption by the grantor. Not only this, but it purports to lease the premises for the whole year allowed to redeem for the sum of $450. While the lowest evidence as to the real value of the use and occupation of the premises is placed at $450 per month,

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or why the Court followed the rule applicable in such cases, after the reason for it had ceased, we are unable to answer. Why, in the absence of the requirements of the law theretofore extsting, when the particular objection was required to be stated, the Court continued to apply a principle only applicable in such cases, is difficult to perceive. It asserts this strange doctrine, that while all that is necessary is to object to a particular instruction, without stating the grounds, you must go through the whole series separately, and cannot object to the instructions from 1 to 7 inclusive.

This course certainly could serve no intelligent or useful purpose, and only entails upon the attorney and court *useless* and *meaningless* labor. If when the reason ceases the rule should also cease, upon the same principle, if there is no reason for the rule, it should be disregarded. Even if the decision in that case was applicable and great injustice had been done, the Court, as one of the highest resorts under the Organic Act of the Territory, will do as it did in Kleinschmidt vs. McAndrews, 117 U. S., 282, *supra*, reverse its ruling upon the construction of the Practice Act, and correct such errors as manifestly work an injury to the appealing party.

Let us, however, see whether the decision in Woods

vs. Berry, 7 Mont., 195; 117 Pac. Rep., 759, is not utterly inapplicable here. Bearing in mind that the point or grounds of the objection is unnecessary, and that the objection is to be filed with the clerk, let us see what was before the Court in that case. We quote from the opinion, p. 759: "Now comes the defendant and objects and excepts to giving to the jury the instructions asked for by "plaintiff, No. 1 to 16 inclusive, and objects and excepts to "giving of each and every one of them, for the reason that "the same and every one of them are contrary to "the law and not warranted by the evidence." Now the infirmity in this objection, in the judgment of the Court, is that this formula was not repeated sereatim to each instruction separately. Concluding this to be the law, does not the bill of exceptions signed by the Judge trying the case show that this was done? We quote from bill of exceptions in so far as applicable. (Record page 5):

"And furthermore, the plaintiff requested the Court "to give the jury certain instructions, which they sub-"mitted and filed and numbered 1 to 7 inclusive, and "the defendant objected to giving each, every and all of "said instructions, because the same do not correctly "state the law as applicable to the facts in evidence and "issues in the case, and tend to mislead and prejudice the

"jury to the injury of defendant; but, nothwithstanding "said objections, the court gives said instructions, and to "this action of the court the defendant then and there "by his counsel *duly excepted, etc.*"

This exception became a part of the judgment roll, under section 306 of the Compiled Statutes of Montana, which is identical with the one in force at the time of the trial, and reads as follows:

"Immediately after entering the judgment, the clerk "shall attach together and file the following papers, "which shall constitute the judgment-roll. * * * * "*Second:* In all other cases the summons, pleadings, "verdict of the jury, or findings of the Court, commis- "sioner or referee, *all bills of exception taken and filed* "*in said action*, copies of orders sustaining or overruling "demurrers, a copy of the judgment, and copies of any "order relating to a change of parties."

So that the appeal from the judgment brings up for review the instructions given, if *duly excepted*, as shown by the bill of exceptions, regardless of any statement on appeal.

The Court instructed the jury throughout, in emphatic terms, that unless there was a personal liability on the part of defendant to pay the amount agreed upon

for a repurchase and reconveyance of the property deeded, upon which a personal judgment could be recovered, then the transaction could not be a mortgage. "The question of the inadequacy of consideration, the "question of computation of interest, and all evidence in- "troduced by defendants for the purpose of showing, or "tending to show, that the transactions in evidence were "intended to be a mortgage instead of a sale, are utterly "immaterial."

Whether or not there is a conflict in the evidence as to the personal liability of the plaintiff, the instructions of the court on this point were radically wrong, under every *conceivable* condition of things, and can as well be considered upon the appeal from the judgment as under the statement.

Let us see, then, whether the bill of exceptions, reciting that the exception to the instructions given, from 1 to 7, were *duly taken*, entitles the plaintiff to have the instructions reviewed.

Section 291, Compiled Statutes of Montana, identical with that in force at the time of trial, p. 133, reads as follows: "The point of the exception shall be particu- "larly stated, except as provided in relation to instruc- "tions." Section 262, subdivision seventh, applicable

here, reads as follows: "If any party to the trial de- "sires to *except* to any instruction given by the court, or "to the refusal of the court to give an instruction asked "for, or any modification thereof, he shall reduce such "*exception* to writing, and file the same with the clerk "before the case is submitted to the jury."

When this is done, if he desires a bill of exceptions, so as to become a part of the judgment-roll, the following is applicable: "Section 294. All bills of exceptions "shall be reduced to form, unless noted by the clerk and "signed during the term in which the same is tried, ex- "cept in cases where the counsel consent, or the Judge, "by an entry on the record, direct that it may be pre- "pared in vacation, and signed *nunc pro tunc.* * * *"

Assuming that it was necessary for the attorney to file with the clerk an exception, reciting the instructions excepted to numerically, before the cause was submitted to the jury, is any additional evidence required that this was done than the solemn declaration of the court in the bill of exceptions that *plaintiff duly excepted?*

American and English Encyclopedia of Law, vol. 6, page 54, interprets the word 'duly' to mean: "In a proper "way; regularly; according to law;" and cites numerous authorities to support this definition of the term. If this be accepted, the bill of exceptions would read: "And

"said plaintiff in a proper way; regularly; according to "law, excepted to said instructions from 1 to 7, inclu- "sive." It was not necessary to point out the grounds or point of the exception, as we have seen. What more, then, is necessary? It is not a case where the pleader is pronouncing conclusions from certain facts. In the bill of exceptions we have the Judge pronouncing his judgment upon the particular matters confided to him. It is the result of the facts, declared by the officer whose duty it was to pass upon them, and if they did not exist, as stated, it was the duty of counsel to have then and there objected, that the matter might be remedied, when he well knew that the office of the bill of exceptions was intended to review the instructions upon their merits.

If he fails to do this, *at that time*, he can not afterwards complain, but the court will assume that, if he had done so, the facts would have been found to exist constituting a *lawful exception*, and the recital in the bill of exceptions that the exception was duly taken will be regarded as conclusive of that fact, on the appeal. Eminating as it does from the Judge, who passes judicially upon the facts before him, these recitals are especially significant, and import verity of a much higher order than if contained in ordinary instruments. In his official capacity he has declared in short form

that the exceptions were taken according to law. The question here presented is one of interpretation of this writing, and not one of practice, as in the case of Woods vs. Berry, *supra*. The statute of Montana in force then and now upon this point certainly does not relax the rule of interpretation heretofore suggested. Section 637, p. 226, reads as follows: "A written "notice, as well as every *other writing*, is to be construed "according to the ordinary acceptation of its terms. "Thus a notice to the drawers or endorsers of a bill of "exchange or promissory note that it had been protested "for want of acceptance or payment, must be held to im- "port that the same has been duly presented for accept- "ance or payment and the same refused, and that the "holder looks for payment to the person to whom the "notice was given."

This section, as well as the one we have quoted with reference to bills of exceptions, forms a part of the Code of Civil Procedure of the State, and is but declaratory of the common law rule, and obtains in all writings, except, perhaps, in pleadings, in which the facts constituting a compliance with a statutory requirement should be stated, is an exception. Hence, under both the common law and statutory rule, a recital in the bill of exceptions that "the defendant, by his counsel, then and there

"duly excepted" is more than was really required to import that the plaintiff in error, by his attorney, filed the proper exceptions, in the manner and within the time required by law. Indeed, the recitals in the bill of exceptions contained in the record should have the force of a finding by the Judge, upon a matter properly submitted to him.

"A bill of exceptions, signed, filed and made a part "of the record, as the law requires, implies absolute "verity."

Elliott's Appel. Proced., Sec. 811, and cases.
Watts vs. Anderson, Etc., Co., 60 Ind., 56.
Beavor vs. State, 58 Ind., 530.
Thames & Co. vs. Beville, 100 Ind., 309.
Blizzard vs. Blizzard, 48 Ind., 540.
Ryan vs. Borkham, 42 Ind., 507.
Jelly vs. Roberts, 50 Ind., 118.
Longworth vs. Williams, 89 Ind., 352.

"It is the duty of the trial Judge to cause all mat- "ters to be incorporated in the bill of exceptions, as the "law requires, before he signs the bill. This effect is "due to the fact that the law assumes that it is a special "instrument, brought under the immediate supervision "of the Judge, and hence subject to a closer scrutiny "than orders or entries made by the clerk, although di- "rected by the Judge. The result of this principle is

"that, where the bill recites special matters different "from the entries in the order-book, *or other record*, it "controls, and other recitals yield to it."

Elliott's Appel. Proced., Sec. 763.
Ind., &c., vs. Adams, 112 Ind., 302.
Alley vs. State, 76 Ind., 94.
Cincinnati, &c., Co. vs. McFarland, 22 Ind., 459.
Carmichael, &c., vs. Shield, 21 Ind., 66.
Doe vs. Smith, 1 Ind., 45.
State vs. Flemons, 6 Ind., 279.

In this last case (6 Ind., 279,) it was said: "The "bill of exceptions will be taken as true, and will correct "the other portions of the record, for the reason that "the minutes are kept by the Clerk, but the bill of ex- "ceptions brings the facts distinctly to the attention of "the Judge, who signs it."

A bill of exceptions is conclusive evidence as between the parties in that suit of the facts stated therein.

2 Am. & Eng. Enc. of Law, page 222.
Law vs. Merrils, 6 Wend. (N. Y.,) 276.
Shatwell vs. Hamblin, 23 Miss., 156.
Bingham vs. Cabbot, 3 Dallas (U. S.,) 38.

In this case, (3 Dallas U. S., p. 38,) it is said by the Sup. Ct. of U. S.: "It is exceedingly clear that the "bill of exceptions is conclusive upon this court. We

"cannot presume or suspect that any material part of "the evidence is omitted. On this objection, therefore, "nothing now need be added."

It seems clear that the bill of exceptions imports absolute verity as to the facts recited in it, and it is equally as clear that the recital that "the defendant by "his counsel then and there duly excepted," imports that the exception was taken in accordance with the statute.

In Anderson's Law Dictionary, page 385, the word "duly" is defined to mean, "in a due manner, regularly, legally.

"The word duly means in the proper way; regu- "larly, according to law." (Gibson vs. People, 5 Hun., N. Y., 543.), citing:

People vs. Walker, 23 Barb., 304.
Fryatt vs. Lydo, 2 Edward Ch., 239.
Burns vs. People, 59 Barb., 531.

"An averment in a complaint that a meeting was "'duly convened,' implied that it was regularly convened, "and, if necessary to its regularity, that it was an ad- "journed meeting."

People vs. Walker, 23 Barb., 304.

The author of Black's Law Dictionary, p. 399, says:

"Duly' means, "in a due and proper form and manner. and the Am. & Eng. Enc. of Law, vol. 6, p. 54, says: "In a proper way; regularly; according to law,"

"The recital in a referee's report that he had been "*duly qualified*, is *prima facia* evidence that he had been "sworn as the statute required, particularly where there "had been no objection by the parties.

Edwards vs. Barnhardt, 56 Mo., 81.

"'Duly recorded,' in an act, means recorded according "to law."

Dunning vs. Coleman, 27 La. Ann., 47.

The question presented is not one of practice, but one of construction and effect, to be given to the language used in the bill of exceptions, signed by the court trying the case. This bill of exceptions, interpreted according to the authorities, is tantamount to a statement that the exceptions were taken in writing to each particular instruction, from one to seven, inclusive, and that the same was filed with the clerk during the progress of the trial. If this was the language used by counsel in a pleading, there might be reason for making it more specific upon a motion from the opposing party for that purpose, for the reason that it would express perhaps too much the opinion of the pleader, without the substantial facts to

support it. Upon such motion it would be corrected in this respect, and, if the objection was available to the bill of exceptions, the same proceeding would have been had and the bill of exceptions corrected in that respect. Eminating, however, as this does, from the court, we do not think it subject to the same objection. In the one case it would be a conclusion drawn by the pleader, and in the other a statement which is peculiar within the provisions of the court to make from the facts before it. If any objection made to the pleading and conclusions is thus stated, it is deemed waived, and is not considered such a defect as would invalidate it. Defendants in error did not, evidently, make any objection in the court below at the time of the signing of the bill of exceptions; did not seek to modify or change the language used, or require a copy of the exceptions to be inserted in lieu of it, else the court would probably have done so, and it is now certainly too late. The opportunity to correct it has passed, and it must consequently receive such construction as the law under the circumstances places upon it. Upon a question similar to the one presented, in the case of Simpson vs. Dale, 3 Wallace, page 473 and 474, Mr. Justice Davis says: "It is contended by defendants in "error that the rulings of the Circuit Court, which are "alleged to be erroneous, were not saved during the prog-"ress of the trial, and cannot, therefore, be investigated

"here. If this was so, it would be fatal; but we do not "thus interpret the record. It is well settled that bills of "exceptions are restricted to matters which occurred "during the progress of the trial; but it is not necessary, "neither is it the practice, to reduce to form every ex- "ception as it is taken, and before the trial is at an end. "It will do for the Judge to note them as they occur, "and after the trial is over; and after the trial, if it is de- "sirable to preserve them, they can be properly embod- "ied in a bill of exceptions. In this case the bill of ex- "ceptions is unskillfully drawn, and it is justly subject to "criticism; but it clearly appears that the rulings of the "Circuit Court, which are sought to be reviewed here, "were excepted in proper time, and when the cause was "on trial, and not afterwards. If this is so, we canno "allow a valuable right to be defeated because the Judge "carelessly used a word in the present tense, when the "true expression of his meaning required the use of the "word in the past tense. It is a fair inference from the "bill of exceptions * * * that they also excepted, "before the jury retired from the bar, to each of the "series of instructions which the court gave to the jury. "The bill of exceptions is, therefore, valid, and brings to "our notice the proceedings of the Circuit Court it is "asserted are erroneous."

Under this opinion it appears that it was the

duty of the Judge to note the exceptions at the time in his minutes, and afterward to reduce them to proper form by Bill of Exceptions before the jury retired. Under the Statutes of the Territory, heretofore quoted, it was the duty of the attorney to file his exceptions with the clerk before the case was submitted, and have his bill of exceptions signed during the term. The court, in the opinion just quoted, *construes* the bill of acceptance in *accordance* with the *true expression* of its *meaning* and the *fair inference gathered* from it; and the question as to whether the exception was taken before the jury retired was bare matter of inference, not being recited. We do not admit that the statute contemplated incorporating into a bill of exceptions a copy of those filed with the clerk. It is not considered necessary in that case that it should appear in the bill of exceptions that the Judge wrote down the exceptions at the time in his minutes and afterwards reduced them to form. Nor do we think that under our statute it should state that they were filed with the clerk and afterwards reduced to form. The statute permitting it to be afterwards *reduced to form and signed* would seem clearly to indicate to the contrary, and that it is all sufficient if the objections and the exceptions were taken at the proper *time* and *place*. Upon the construction, however, to be given the words used in the bill of

exceptions, "*then and there duly excepted*," we call the attention of the Court to the following authorities, in addition to those cited.

Burrill's Law Dictionary, page 524: "Duly; in due "or proper form or manner." "Regularly, upon a "proper foundation, as distinguished from mere form."

It will be assumed that the exception mentioned was presented to the Judge, and in reducing the bill of exceptions to form he considered those filed with the clerk filed according to law, and consequently "then and there duly excepted to." The substance of the thing formed by the court from the records, and reduced to form, is all that is required in the bill of exceptions.

State vs. Fay, 43 Iowa, 651.

In Regina vs. Inhabitants of Kughley, 55th Eng. Com. Law Report, 876, on page 881, Denman, Ch. J., says: "I think that the words 'duly stamped' would "imply not only the amount, but the time of stamping, "in cases where time is essential;" and in the same case Williams, J., says: "The examinations sent by the respond- "ents allege that the instrument was 'duly stamped.' What "that means may be at once ascertained by reference to "the stamp act." And so we say, in this case, what the court means in the bill of exceptions by the words "de-

"fendant then and there by his attorney duly excepted," can be readily ascertained by reference to the Code of Civil Procedure upon that subject, which we have heretofore quoted. See also Bowen vs. Darby, 14 Florida, 202; 23 Barbour, 304, 305; and 23 Barbour, 143–151.

The court held, on demurrer, that the allegation that a policy of insurance was duly assigned implied that it was in writing and by a sealed instrument, when such was required. The same rule of construction applied to the case at bar would imply that the exception was in writing and filed with the clerk. In McCreery vs. Everding, 44 Cal. 249, the court, through Mr. Belcher, J., say: "In Bozeman vs. Cudworth, 39 Cal., 150, the record "stated: To which charge, and each part thereof, plain- "tiff duly excepted. And this was held to be sufficient, "on the ground that counsel, having agreed to the state- "ment, agreed that plaintiff 'duly excepted,' and there "was no necessity of stating the specific mode in which "the exceptions were taken. That case is authority upon "the point in hand, and we are satisfied with the rule there "laid down."

Instruction 1, in so far as it appertains to the personal liability of the plaintiff in error, in order to constitute the transaction a mortgage, reads as follows: "The "test as to whether said instruments were a mortgage is

"this: *If a debt were created* from defendant to plaintiffs, "upon which plaintiffs *could sue in debt*, then the instru- "ment may be a mortgage; if a debt were not created, "then the instruments were not a mortgage, and plaintiffs "must recover possession of the premises in this action. "You must, therefore, determine whether there was a debt. "From the transactions in evidence, can the plaintiffs sue "the defendant for a debt? Did defendant promise to pay "the sum of $17,920 to plaintiffs, or did he simply have "an option to pay it and demand a deed of the premises? "If he (defendant) did not obligate himself to pay, then "there was no mortgage; the plaintiffs must recover "herein; and by the expression 'creation of a debt,' as "used in these instructions, is meant, not a debt existing "at or before the date of the transactions of May 19th "and 21st, as testified to, but rather did those transac- "tions, the *passition* of the instruments of those dates, "and the surrounding circumstances, obligate the de- "fendant to repay to the plaintiffs the consideration "named in said deeds or covenant."

Instruction three, in so far as it refers to the same subject matter, is as follows: "You are further in- "structed that if the evidence does not prove that in the "giving of the deeds, lease and contract, and by the ac- "companying circumstances, a debt was created from

"defendant to plaintiffs, as explained in the previous in-
"structions, the question of inadequacy of consideration,
"the question of the computation of interest, and all evi-
"dence introduced by defendant for the purpose of show-
"ing, or tending to show, that the transactions in evi-
"dence were intended to be a mortgage instead of a
"sale, are utterly immaterial. The test is, was a debt
"created from defendant to plaintiffs; and, if it were
"not, then plaintiffs must recover."

Instruction four refers to the inadequacy of consideration, and assumes to instruct the jury as to the effect to be given to a material fact, and is to the effect that, however grossly inadequate the consideration may be, it is not sufficient to justify them in construing the deed to be a mortgage. It reads as follows: "Gross inadequacy in the price paid for
"property has been held by the courts as a cir-
"cumstance tending to show that a mortgage was
"intended, and not a sale; but this is a circumstance to
"be considered in connection with other facts and cir-
"cumstances adduced in evidence, *and is not sufficient in*
"*itself to warrant or justify construing an absolute deed*
"*as a mortgage.* If the jury, therefore, believe from
"the entire evidence offered that a sale, with an agree-
"ment to reconvey, was intended by the parties at the

"time of entering into these contracts, their verdict shall "be for the plaintiffs, notwithstanding the fact that the "price paid for the property was not its full value."

In the light of the authorities we have presented, we respectfully submit that the errors contained in these instructions are absolutely fatal. Besides, if the personal liability of the plaintiff in error was necessary to constitute a mortgage, and the evidence of the defendants that there was none was taken as true, there was ground for upholding the lease, while if, on the contrary, this was not necessary, and in the absence of such instruction the jury could possibly have found the transaction to be a mortgage, then there was nothing in "Exhibit D" to constitute a lease, as both title, possession and right of possession was in the plaintiff, who should have been the lessor, instead of the defendants. In other words, if the transaction was a conditional sale, that is made so under the instructions of the court, no instruction as to the lease being a mortgage could be effectual, because the question of ownership of the property would undoubtedly be of great weight in determining whether "Exhibit D" was intended as a lease or a mortgage. The court, in substance, said to the jury by these instructions, if you believe the evidence of the witnesses, Gassert and Steele, upon this one matter, you need not go

further, but will declare the transaction to be a conditional sale, and not a mortgage. Instruction four upon this point, given at the request of plaintiff, reads as follows: "The court instructs the jury that it is not neces-"sary or essential that the debt, loan, obligation to pay "money, should be evidenced by a note, bond, or any "other collateral agreement in writing, nor is it essential "to the certain validity of a mortgage that the mort-"gagor should be personally liable for the payment of "the debt or loan secured thereby; but it is sufficient if "the land only is subjected to the satisfaction and pay-"ment thereof."

By this it is manifest that the instructions given on the part of the defendants in error and those given on the part of the plaintiff in error are in conflict in a material matter. In such case we need not cite the court to the authorities, which are uniformly to the effect that this is fatal error. And these instructions, under the bill of exceptions filed as given and refused, are contained in a bill of exceptions, which is a part of the judgment, reviewable on the appeal from the judgment, without the necessity of a statement and specification of errors. Should the court desire to ascertain whether there was a conflict in the testimony upon the question of the personal liability of plaintiff in error, Steele, one of the

defendants in error, testifies: "Bogk does not owe me "anything. He does not owe me a cent. There was no "agreement, note, obligation, or anything of the kind, "for the payment of money received." (Record, top of page 26.)

Gassert, the other defendant, testifies: "I have no "present claim of indebtedness against Bogk in reference "to this business. He owes me no money at all on this property." (Record, page 27.)

Bogk, on page 22 of the record, testifies: "At "the time of the negotiation of this loan I promised to "repay the fifteen thousand dollars to the plaintiff just "as soon as I made a sale of my mines. I had these mines "so I could make a sale of them, and calculated to pay it "that way. I promised to pay it inside of a year."

Hence, should the court consider the evidence material, it is found in the statement on appeal, duly settled and signed by the Judge of the court.

It will be noted that no objection can be urged to the consideration of any error that may have occurred in the refusal of the court to give the three instructions, numbers two, six and seven, offered by plaintiff in error, which appear in the Record, pages 32 and 33.

The first instruction we think asserts the correct

doctrine, and makes the transaction a mortgage, under which the mortgagees were not entitled to the possession of the premises, without a foreclosure and sale. This instruction reads as follows: "The court instructs the "jury that an absolute deed, and a separate written con- "tract to reconvey, both of said instruments being under "seal, and bearing even date on their face, and having "been executed and delivered at the same time, between "the same parties, conveying, and agreeing to reconvey, "the same land to the grantor, in the said deed, upon "the condition of the payment by him of a certain sum "of money to the grantee in said deed at a particular "future date, or within a certain period mentioned "in said contract to reconvey, such instruments together "do constitute and are in law and effect a mortgage, and "will not convey any interest in and to the premises to "entitle the grantee or grantees in the deed to the pos- "session of the land described therein, either before or "after condition broken, and he, or they, could not there- "under make a valid demise of said land and premises "to the grantor in said entitled deed."

While instruction six is perhaps not as specific and certain, on account of the phraseology used, as it could be, it nevertheless, we think, fairly stated the proposition announced by the learned Judge delivering the opinion,

from which this writ of error is prosecuted, which is in the following language: "Where there is a deed and "a contract to reconvey, and oral evidence has been "introduced, tending to show that the transaction was "only a security, and leaving upon the mind a well "founded doubt as to the nature of the transaction, "then courts of equity incline to construe the trans- "action as a mortgage. Citing:

Morris vs. Bublong, 78 N. Y., 543.
———vs. Buchanan, 1 So. Rep., 898.
Ferris vs. Wilcox, 51 Mich., ——
Convay's Ex'rs. vs. Alexander, 7 Cranch, ——
Hickman vs. Cartnell, 9 Yerger. 171" (Record, p. 26.)

To the same effect would seem to be the decision of this Court in Peugh vs. Davis, 96 U. S., 334, where the following language is used: "A Court of Equity will "not allow the right of redemption to be defeated "by any agreement making that which is really a mort- "gage a conditional sale, but, where the transaction is "doubtful, will incline to give effect to the instrument as "a mortgage. Citing Russell vs. Southard, 12 How., "139. Dougherty vs. Colgan, 6 Gill & J. (Md.), 27. "Arts vs. Glover, 21 Md., 456. Baugh vs. Marry- "man, 32 Id., 185."

The instructions so offered by plaintiff in error and

refused by the court reads as follows: "The court in- "structs the jury that if they after a full and fair con- "sideration of all the facts and circumstances in evidence "in this case are still in doubt as to whether said deeds "and contract to reconvey were made and intended to "secure the payment of a debt, loan or an advance of "money, and together constitute a mortgage, then they "should find such to be the fact."

The instruction in substance tells the jury that if they after a full and fair consideration of all the facts and cirmcumstances in evidence in this case are still in doubt as to whether said deeds and contract to reconvey were made and intended to secure the payment of a debt, loan or an advance of money, and together constitute a mortgage, they should find the same to be a mortgage.

Under the statute we have quoted, the bill of exceptions is a part of the judgment-roll, and the appeal from the judgment brings up for review the matters excepted to, without the necessity of a statement on appeal, unless it is required to show that injury has resulted from the errors complained of. If, therefore, the court finds that the instructions were wrong and misleading under any conceivable phase of the evidence, both error and injury are then manifest from the judgment-roll, and no statement or assignment of errors is necessary to

reach the question. As said by the Supreme Court of California in People vs. Levison, 16 Cal., 99: "It is true, "there is no statement in this case. But when the in- "structions are erroneous under any and every state of "facts, then this court will review them. For it follows "as necessarily, in such a case, that the court erred, to the "prejudice of defendant, when there is no statement, as "when one exists."

People vs. Levison, 16 California, 99,100.

Hayne on New Trials and Appeals, Sec. 130 and authorities there cited.

When the exception depends upon evidence or any other matter outside of the pleadings, the same, to be considered, must be presented upon statement on appeal or by bill of exceptions, according to section 291 and 292, *supra.* While the question as to the ruling upon the instructions here are presented both by bill of exceptions and a statement of the case, if wrong in every aspect we consider them, they can be reviewed under either Barber vs. Brisco, 8 Montana, 214, 221; Barber vs. Briscoe, 19 Pacific, 589, 591. Citing Sec. 291 and 292, hereinbefore quoted, which requires the point of the exception to be stated, except in cases of instructions as per section 262, *supra.*

It will be noted that under the statute objections and

exceptions to instructions are taken after they are given, or refused or modified by the court, and that the specifications of the grounds of the exception are dispensed with. This is the statute upon the subject, whatever may be said of the justice or propriety of it. Hence, with the naked bill of exceptions, in connection with the balance of the judgment-roll, the question presented is reviewable. It is not necessary, therefore, in this case to look outside of the judgment-roll to encounter the fatal error presented by it, unless the court is disposed to resort to the statement in which it is included in connection with the evidence. The judgment-roll here comprises the pleadings, instructions, exhibits A, B, C and D, as per bill of exceptions No. 1 record, pages 4 and 5, and bill of exceptions No. 2 record, pages 5 to 13, inclusive. These bills of exception lose none of their attributes as a part of the judgment-roll because incorporated in the statement, and will be considered to the extent they are available as such part of the judgment-roll, regardless of the statement, and if, therefore, they present error under every state of facts, injury will be presumed and the case reversed.

We recur again for a moment to the decision of this court in Wallace vs. Johnstone, 129, U. S. 64 *supra*, as it may be contended that the precise question here

presented has been passed upon. As to this case it will be seen: *First.* That the deed was one of general warranty of title on account of which the covenants may have been regarded inconsistant with the idea of a security. *Second.* The agreement to convey was to a third party, and not to the grantor, so as to imply a right to repurchase and redeem. So that the exact question was not before the Court, and it was called upon to decide only as to the effect of an independent option given by the grantee to a third person to purchase.

The first case referred to in that opinion, Cadman vs. Peter, 118 U. S., 73, involved the effect to be given to a parol agreement which was inconsistent with the right to redeem, and dependent upon entirely different premises than the present case. Mr. Justice Blatchford, speaking for the Court, says: "The agreement set "forth in the bill is inconsistent with a right to redeem, "it being stated as an agreement, under which Peter "was to hold the land until he should sell it, and then "share in any profit from the sale. Under that agree- "ment, even if it was valid, the deed cannot be turned "into a mortgage, although the execution of the agree- "ment if valid might be compelled, when the land could "be sold at a considerable profit. If the agreement is "obnoxious to the statute which declares that no trust

"concerning or in any manner relating to land shall be "created by parol it can not be enforced specifically nor "employed to turn the deed into a mortgage. The "agreement, if valid, would make Cadman a beneficiary "under the deed and create a trust in Peter, concerning "or relating to land and not being in writing and prop- "erly signed is void under the statute of frauds."

Besides being a parol agreement involving the trust aforesaid, Peter gave back to Cadman a mortgage which contributed to fortify the effect of the deed against the parol agreement. The Court then proceeds to declare that under such circumstances the evidence to convert the deed into a mortgage, if the same could have been done, in that case should be strong and convincing. Here the agreement to reconvey is not encumbered with any question involving a trust under the statute of frauds, was in writing and of equal dignity with the deed, involving an interpretation of the legal effect to be given to the two instruments. The Court in Wallace vs. Johnstone, *supra*, adopted the principles announced in Cadman vs. Peter, in so far as the burden and quantum of proof was concerned, because the agreement to sell to a third person could only be connnected with the vendor so as to imply a right to repurchase and redeem, by parol evidence.

This is evident from the question presented and principle of evidence announced at the bottom of page 64, 129, U. S., *supra*, where some authorities are cited as in Cadman vs. Peter, 118 U. S., bot. p. 80, which can have no application to a defeasance or right to repurchase, in writing, when the genuineness of the writing is not questioned.

The next case cited, likewise, shows that the court, in Wallace vs. Johnstone, had to resort to oral evidence in connecting the agreement with the third party with the grantee to import into the transaction a right to repurchase and redeem, and thereby render it obnoxious to the legislation of the State, is manifest from the question involved and reasoning of the court in that case. The case is Coyle vs. Davis, 116 U. S., 108. It was a suit to declare an absolute deed a mortgage upon parol evidence, there being no defeasance in the deed or in a collateral paper. The property sold for about its value, and the court, finding the *parol* evidence not clear, inequivocal and convincing, refused, under these circumstances, to declare the deed a mortgage.

The next case cited by the court, in Wallace vs. Johnstone, is Horbach vs. Blake, 97 U. S., 624. It was, likewise, an effort to create a mortgage and also a trust by parol evidence. It was held objectionable, on

account of the latter feature, and the evidence was held insufficient to establish the former. Further comment is unnecessary.

The other case referred to, Horbach vs. Hill, 112 U. S., 144, is not at all in point. The transaction did not involve a deed with a simultaneous agreement for a repurchase and reconveyance, upon the payment of a sum certain, at a fixed time. Other matters entered into the transaction, which tended to characterize it, and formed a part of the facts recited in the agreement, and it became necessary to interpret it by the accompanying circumstances, no effort being made to do so by the contemporaneous conversations of the parties, as was the case here. On account of the ambiguity growing out of the recitals in the agreement, the Court considered it necessary to resort to the accompanying circumstances to explain its objects, in a suit brought by a creditor to fasten upon the interest of one of the parties to the transaction. Mr. Justice Field, in delivering the opinion of the Court, referred to certain facts, which usually form the indicia upon which a mortgage is distinguished from a conditional sale, and shows that it was conditions independent of the deed, and an agreement for a redemption or repurchase, that necessitated a resort to extrinsic evidence to get at the real intention of the parties. The

price paid was not inadequate, and the father was, in addition to the repayment of the consideration paid by the son, to also obtain a release of two bonds exceeding three thousand dollars. The real question, then, was whether an ageeement to reconvey real estate upon the repayment of the purchase money *and the performance of other conditions*, constituted a mortgage, and the court held that it must be determined by the accompanying circumstances. In that part of the opinion applicable, this language is used: "In the second place, if the con- "veyance by the father to the defendant be treated as "invalid, the title to the lots passed by the administrator's "sale, and the subsequent deed in pursuance of it. The "master found that the purchase by Kennedy at that sale "was in good faith, but was void because of his knowl- "edge that the property was held by the deceased as "mortgagee, and that the defendant acquired no title "from Kennedy, because of like notice. But the con- "clusion that the conveyance by the father to the son "was a mortgage, was a mere assumption, not warranted "by the accompanying agreement. There was no obli- "gation resting on the father to make the payment men- "tioned in that agreement and claim a reconveyance. "He had an option to do so, and then he was not merely "to repay the consideration given by the son, but in addi- "tion thereto he was to obtain a release of two bonds by

"him exceeding three thousand dollars in amount. Upon "such release the vendee agreed to reconvey the "lots for the original consideration and the expenses "incurred on them. These extraneous facts shown to "explain the object of executing the papers, such as a "previous indebtedness of the father, or a liability on his "part to secure the son against the bonds mentioned. "Nor did it appear to whom the bonds were issued, nor "for what consideration. Nor was it averred that the "transaction was in any respect from what the instru- "ments imported—a sale to the son. The agreement can "therefore be considered only as an independent contract "to reconvey the lots on certain conditions. The assump- "tion that the conveyance of the father to the son was a "mortgage being unfounded, the objection to the pur- "chase by Kennedy falls. That being valid, the deed "received by him passed a good title, which he trans- "ferred to the defendant." We submit that in none of these cases has the question been properly before this Court, which involved and required the interpretation of a deed absolute upon its face, with or without covenants of warranty, where at the time of execution the *grantee* gave back to the *grantor* a written agreement of equal dignity, securing to such *grantor* the right to repurchase and redeem upon the payment of a certain sum at a certain time, all constituting one transaction between the

parties. And we also submit that any decisions had early in the legal jurisprudence of our country, before legislation had taken the shape it has in Montana, are inapplicable here.

We respectfully submit:

I.

That upon the weight of authorities and reason, that the deed from plaintiff to defendants, though absolute upon its face, in connection with the agreement for a repurchase and reconveyance of the same property back to the grantor for a sum certain, at a given time, of the same date and forming one and the same transaction, constitute in law a mortgage; and especially is this so in those States where, under the policy of their laws, the equity of redemption of real estate held as a security, no difference what the terms of the instrument under which it is so held may be, cannot be disposed of *by or under such instrument* without foreclosure and sale, and that on this account this case should be reversed, with directions to enter judgment in favor of plaintiff in error.

II.

That if the line of authorities as claimed by defendant is to be pursued, and the two instruments in-

terpreted according to the statute, from the circumstances and surroundings, the question involves a legal one, and under the principles announced by the authorities upon the subject, the undisputed facts showing that the application was for a loan; that it was made under pressing circumstances; that the advance was made to pay off the debts against plaintiff and the property; that defendants refused to accept a mortgage, but agreed to and did take a deed, and gave back at the same time, and as a part of the same transaction, an agreement to reconvey upon the repayment of the sum advanced and interest, at a fixed time; that the sum advanced did not exceed one-third of the actual value of the property conveyed, and that no change of possession was had under the arrangement so made, it was the duty of the court to declare the transaction a mortgage, and have ordered judgment for plaintiff in error, and that it should be ordered so to do.

III.

That if it was the duty of the jury to find from the facts and circumstances, or even contemporaneous conversations between the parties, whether the deed and defeasance constituted a conditional sale or a mortgage, that the court in its instructions committed a fatal error in directing the jury that, unless plaintiff obligated and bound himself personally to pay the sum advanced and

interest, the transaction could not be a mortgage, no difference how gross the inadequacy of consideration might be or what the character of the other attending circumstances were, and on that account the case should be reversed and remanded for new trial.

IV.

That, upon the undisputed testimony of both plaintiff and Defendant Steele, the lease was given to secure the sum of four hnudred and fifty dollars for the annual representation of the mining claims and taxes ; that the plaintiff was in possession and entitled to possession aside from the lease during the period of the lease, and that the rent reserved was so grossly inadequate as to shock the conscience of the Court, being only one twelfth of the rental value of the premises, thereby depriving the same of its *bona fides* as a lease; it was the duty of the Judge to have interpreted the same as a mortgage and the case should be reversed with directions so to do.

V.

That the deed, agreement and lease, being in evidence, without any testimony showing a change of possession under or referable to either, in connection with the fact that a sum certain was fixed as the consideration

for the lease, the same being only one-twelfth of the rental value of the premises for the term for which they purported to be leased, being all the evidence offered by defendants in error, it was the duty of the Court to have declared the transaction a mortgage by granting plaintiff's motion for a non-suit, under the statutes of the State, which are herein quoted, and that the case should be reversed on that account, with directions to the lower courts to sustain said motion.

VI.

That instructions 2 and 7, offered by plaintiff in error, refused by the Court, and to which ruling exceptions were duly taken by plaintiff, correctly stated the law, and that for the error of the Court in refusing the same the case should be reversed and a new trial ordered, if, for the reasons hereinbefore stated, judgment should not be directed for plaintiff in error.

We respectfully submit that if any of the grounds enumerated constitute a fatal error, this cause should be reversed and judgment directed for plaintiff in error, or a new trial granted, as the case may require.

As no oral argument is contemplated at this time by plaintiff in error, it has been the purpose of counsel, in

this brief, to present the questions involved as fully as possible to the Court, and thus contribute all in their power to facilitate in the determination of an important legal proposition.

Respectfully submitted,

EDWIN W. TOOLE,
AND WM. WALLACE, JR.,
Of Counsel for Plaintiff in Error.

149 U.S. 171

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

Term No., 179.

GUSTAVUS BOGK, PLAINTIFF IN ERROR,

vs.

HARRY GASSERT, JACOB READING, AND JAMES H. STEELE.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

BRIEF FOR DEFENDANTS IN ERROR.

M. F. MORRIS,
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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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BRIEF FOR DEFENDANTS IN ERROR.

I.

STATEMENT OF CASE.

The question in this case is whether a transaction, purporting on its face to be a sale of real estate, with a separate and independent agreement for reconveyance upon certain conditions that were never complied with, was in fact what it purported to be, or was merely a mortgage given to secure

a loan of money. Both the district court and the supreme court of the Territory held the transaction to be, what it purported on its face to be, a conditional sale, which became absolute on the non-performance of the condition on which reconveyance could have been demanded, and not a mortgage.

The facts are these, as they appear on the record. Gustavus Bogk, plaintiff in error and defendant below, was the owner of a lot of ground in Butte City, Montana, on which stood a public house, known as the Virginia chop-house. He was also the owner of some mining claims, five in number, located in Summit valley, Silver Bow county, Montana. It would seem that he became involved in debt, and was unable to continue his holdings. So, on May 19, 1885, by a deed in fee duly executed, he sold and conveyed one-half undivided interest in the property just mentioned to James H. Steele, one of the defendants in error, for the sum of $7,500; and simultaneously, by another similar deed, he sold and conveyed the other one-half undivided interest to Gassert and Reding, the other defendants in error, for a similar sum of $7,500 (Rec., pp. 5–7). These two sums were paid to Bogk, and disbursed by his attorney under his direction (Rec., pp. 21, 22). By a separate and independent instrument of writing of the same date (May 19, 1885), Gassert, Reding, and Steele agreed to reconvey the property to Bogk, if, on or before the end of one year thereafter, he would pay to Steele the sum of $8,967.50, and to Gassert and Reding a like sum of $8,967.50 (Rec., p. 9). This sum of $8,967.50 for each, or $17,935 in all, was the purchase price of the property ($15,000) with interest compounded thereon monthly for one year (Rec., p. 18). This agreement

of reconveyance recited the previous sale of the property, and has no mention whatever of any loan of money.

Two days afterwards, on the 21st of May, 1885, Bogk took a lease of the premises from Gassert, Reding, and Steele, for the term of one year thereafter upon a nominal rent of $450 a year, with the privilege of working the mines for his own use and benefit (Rec., p. 10).

Bogk never offered to repurchase the property, or tendered to the defendants in error the sum of $17,935, or any sum whatever.

Under this condition of things, the lease having expired, the defendants in error demanded possession of the property; and upon the refusal of Bogk to comply with the demand, they brought suit before a justice of the peace under a statute of Montana that provided for summary proceedings against tenants holding over. Upon a plea of title in himself interposed by Bogk, the suit was transferred to the district court of the proper judicial district, in accordance with the requirements of the statute, and was there proceeded with as though begun in that court (Rec., pp. 1–3, 40).

Trial was had before a jury. The defendants in error, plaintiffs below, proved the deeds of conveyance, the agreement to reconvey, and the lease by them to Bogk, as also the rental value of the property; and then rested (Rec., pp. 5–15). Notice to quit and failure to surrender the premises had been averred in the complaint (Rec., p. 2); and not being denied by the answer (Rec., p. 3), under the provisions of the Code of Procedure of Montana (sec. 109, Code of 1887) were taken as admitted.

Thereupon, counsel for the plaintiff in error moved for a nonsuit, on the alleged ground that the defendants in error

had not shown that they were ever at any time entitled to the possession of the premises, or that the plaintiff in error had entered into possession under the lease, or that notice to quit or demand for the surrender of the premises had ever been given to the plaintiff in error (Rec., p. 13). The court overruled this motion; and this ruling is alleged for error in bill of exceptions No. 2 (Rec., pp. 5–13), so numbered, although in proper sequence it should be designated as No. 1.

The plaintiff in error then entered upon testimony on his own behalf (Rec., p. 16): and there was also testimony in rebuttal (Rec., p. 25). On the conclusion of the testimony, both sides asked for instructions to the jury (Rec., p. 28). The defendants in error submitted seven prayers for instructions (Rec., pp. 28–30); and the plaintiff in error, twelve (Rec., pp. 30–33). All the former were given; and of the latter, nine were given, and three refused (Rec., pp. 28–33). The action of the court in regard to these instructions is made the basis of the bill of exceptions No. 1 (Rec., pp. 4–5).

These are the only exceptions or bills of exceptions in the case. But there is also what is called a "statement on appeal" (Rec., pp. 15–37), in presumed accordance with the provisions of the Territorial Code of Procedure providing for appeals to the supreme court of the Territory. This "statement" contains the testimony in the case (Rec., pp. 15–28), the instructions given and refused (Rec., pp. 28–33), the verdict (Rec., p. 33), the judgment of the court (Rec., pp. 33, 34), notice of appeal and undertaking on appeal (Rec., p. 35), and an assignment of errors by the defendant, plaintiff in error, here, for the territorial supreme court

(Rec., p. 36). It is presumed that this "statement on appeal" will not be considered by this Court.

The verdict of the jury was for the defendants in error, plaintiffs below; and judgment was rendered in accordance with the verdict. Upon appeal to the supreme court of the Territory, the judgment was sustained (Rec., p. 48). The opinion of the court, in which all the judges concurred, and which contains a full and elaborate citation of the authorities bearing upon the question in controversy, appears in the Record, pp. 40–48.

II.

BRIEF OF ARGUMENT.

1.

We presume it is proper to consider first the bill of exceptions numbered two.

If the motion for a nonsuit may be regarded, as we presume it may, as a demurrer to evidence, or a motion to instruct the jury at that particular stage of the case to find a verdict for the defendant on the presumption that the plaintiffs had failed to make out their case, the refusal of the court to grant the motion, or so to instruct the jury, cannot be assigned for error here, inasmuch as the defendant afterwards went on and introduced evidence on his own behalf; and the motion was not renewed at the close of the testimony. This point has been distinctly and repeatedly decided by this Court.

Accident Ins. Co. *vs.* Crandal, 120 U. S., 527.

Railway Co. *vs.* Cummings, 106 U. S., 700.

Bradley *vs.* Poole, 98 Mass., 169.

This alone, it seems, should dispose of bill of exceptions No. 2.

But besides this, it is plain that the motion was both unfounded and untenable. It was treated by both territorial courts as founded upon two grounds: 1st. That the evidence failed to prove any demand by the defendants in error for the surrender of the property; and 2d. That the proof, as adduced on behalf of the defendants in error, was of a mortgage, and not of a tenancy.

But plainly no proof of demand, or of notice to quit, or of refusal to surrender the premises, was necessary. All these things were alleged in the complaint: they were not denied in the answer: and as already stated, under the Code of Procedure of the Territory (sec. 109, above cited), they must be taken as admitted by the defendant.

The section of the Code of Procedure, to which we refer provides: "Every material allegation of the complaint, or answer, not controverted by the answer, or replication thereto, shall, for the purposes of the action, be taken as true."

Compiled Statutes of Montana: Code of Civil Procedure, sec. 109.

Proof was therefore superfluous aud useless.

The second ground, that the transaction was a mortgage seems to have been treated by the supreme court of the Territory with more consideration than, under the circumstances, it deserved. For, as we respectfully submit, the question was not fairly raised at all at that stage of the case

The evidence up to that point had been simply of an absolute deed of conveyance by the plaintiff in error to the

defendants in error, of a separate and independent agreement by them to reconvey the property to the plaintiff in error on condition of the payment by him of $17,935 at or before the end of one year, and of a lease of the premises by the defendants in error to the plaintiff in error, in itself inconsistent with the theory of a mortgage; and further that there had been no offer to pay the money to secure reconveyance, and that the lease had been terminated by its own limitation, by notice to quit, and by demand for the surrender of the property. This, with proof of the rental value of the property, was all the evidence in the case at the time when the motion for nonsuit was made, and the bill of exceptions No. 2 was taken. And upon this evidence it is sought to raise the question of mortgage.

Plainly it was a case of conditional sale that had become absolute, and not of mortgage.

The defendants in error, plaintiffs below, had probably proved more than they were required to prove. It was a case of contest between landlord and tenant; and proof of the lease and of its determination and of the failure of the plaintiff in error to surrender the premises would seem to have been sufficient for the defendants in error in their testimony-in-chief. If they had no title or no sufficient title, or if title was in the plaintiff in error, that was for him to show in his testimony in defense. But the defendants in error went farther, and voluntarily proved their title before they were actually called upon to prove it.

But, however this may be, it is clear that the evidence in this case disclosed no mortgage, but only a conditional sale that had become absolute. Counsel for the plaintiff in error seems to have considered a conditional sale and a mortgage

as equivalent. They are radically different. Of course, a deed absolute on its face, with a separate and independent contract for reconveyance upon conditions to be performed, may be shown to be a mortgage. A mortgage may have been intended by the parties: but that is matter of proof; and it is incumbent on the person who wishes to show it to be a mortgage, to adduce satisfactory proof for the purpose. A deed absolute on its face, with an independent agreement to reconvey, is not in itself a mortgage. This has been frequently held by this Court.

In the case of Wallace *vs.* Johnstone (129 U. S., 58), this Court said:

"A deed of lands absolute in form with general warranty of title, and an agreement by the vendee to reconvey the property to the vendor or a third person, upon his payment of a fixed sum within a specified time, do not of themselves constitute a mortgage; nor will they be held to operate as a mortgage, unless it is clearly shown, either by parol evidence or by attendant circumstances, such as the condition and relation of the parties, or gross inadequacy of price, to have been intended by the parties as a security for a loan or an existing debt."

And in support of this are cited the following cases, in which the same doctrine has been positively enunciated:

Cadman *vs.* Peter, 118 U. S., 73, 80.
Coyle *vs.* Davis, 116 U. S., 108.
Horbach *vs.* Hill, 112 U. S., 144.
Howland *vs.* Blake, 97 U. S., 624.

In the case cited of Horbach *vs.* Hill (112 U. S., 144), in which there had been a conveyance by a father to a son, with a collateral but independent agreement to reconvey for

a stipulated sum at a fixed time, this Court, by Mr. Justice Field, said:

"The conclusion that the conveyance by the father to the son was a mortgage was a mere assumption, not warranted by the accompanying agreement. There was no obligation resting on the father to make the payments mentioned in that agreement, and claim a reconveyance. He had an option to do so; and then he was not merely to repay the consideration given by the son, but in addition thereto he was to obtain a release of two bonds by him exceeding $3,000 in amount. Upon such release, the vendee agreed to reconvey the lots for the original consideration and the expenses incurred on them. There were no extraneous facts shown to explain the object of executing the papers, such as previous indebtedness of the father, or a liability on his part to secure the son against the bonds mentioned."

In the present case, the record would be searched in vain from beginning to end for any evidence whatever of liability or *obligation* on the part of the plaintiff in error to pay the sum of $17,935, or any other sum, to the defendants in error, other than the amount of the judgment rendered by the court as damages for the detention of the property. He only had an option, not an obligation; and he neither offered to perform any supposed obligation, nor to avail himself of the undoubted option. And, under any circumstances, mortgage or no mortgage, in the absence of payment of the stipulated sum or at least of an offer to pay it, the defendants in error were entitled to recover in this case.

So it seems clear that bill of exceptions No. 2 is untenable.

2.

Now, we come to the consideration of the other bill of exceptions, designated in the record as No. 1. (Rec., p. 4.)

This is based upon the action of the trial court in granting the instructions requested by the defendants in error and refusing three of the instructions requested by the plaintiff in error. As already stated, seven instructions were asked by the defendants in error; and they were granted (Rec., pp. 28–30). The plaintiff in error objected "to the giving of each, every, and all of said instructions because the same do not correctly state the law as applicable to the facts in evidence and issues in this case and tend to mislead and prejudice the jury to the injury of the defendant" (Rec., p. 5). But when, notwithstanding the objection, the instructions were given, the exception taken was in gross "to this action of the court." (Rec., p. 5.)

So also, in reference to the three instructions out of the twelve requested by the plaintiff in error which the court refused to give, both the objection and the exception were in gross to the refusal of the court to grant the three instructions. There was no attempt to get a ruling by the court upon the instructions separately.

Even under the liberal practice allowed in the Territories and under the code system of procedure, the supreme court of the Territory of Montana was compelled in this case to comment with some degree of severity upon the course of counsel for plaintiff in error in taking his exceptions in gross, and not separately and severally to the rulings upon the several instructions requested (Rec., p. 46). As remarked by that court, this precise point had been adjudicated several years previously in the case of Wood *vs.* Berry (7 Montana, 195), where it was held that there must be a separate exception to the ruling upon each instruction. It was sought, it seems, to defend the bill of exceptions by reference

to some subsequent amendment of the Code of Procedure: but it is shown very clearly that this amendment could not apply.

This Court has held time and again that no general exception can be sustained to the action of a trial court in granting or refusing a series of instructions presented together and constituting a single request.

Moulor *vs.* Ins. Co., 111 U. S., 335.
Worthington *vs.* Mason, 101 U. S., 149.
Beaver *vs.* Taylor, 93 U. S., 46.
Harney *vs.* Tyler, 2 Wallace, 328.

In the case of Beaver *vs.* Taylor (93 U. S., 46), the rule is distinctly and concisely laid down:

"If one of a series of propositions presented to a court as one request for a charge to the jury is unsound, an exception to a refusal to charge the entire series cannot be maintained.

"An exception to the entire charge of the court, or in gross to a series of propositions therein contained, cannot be sustained, if any portion thus excepted to is sound."

And various cases are cited in support of this now well-established rule of law.

Under this rule it is not apparent how the bill of exceptions No. 1 can be sustained. For in the seven instructions requested by the defendants in error, there are certainly some that are sound; and we believe that all of them are: and the three instructions requested by the plaintiff in error and which were rejected by the court, are each and all of them unsound. But if any one of them is unsound, this is sufficient to dispose of the exception.

Moreover, the reason given for the objections of the plaintiff in error are so vague and indefinite as to preclude their consideration.

3.

In the absence of an assignment of errors specifically by the plaintiff in error, it is not deemed necessary to enter upon any elaborate argument to show the propriety of the action of the trial court in the premises.

So far as concerns the seven instructions requested by the defendants in error and given by the court, it is respectfully submitted that they are more favorable to the plaintiff in error than they need be. The first and third make the existence of an indebtedness, pre-existing or then created, the criterion of the question whether the transaction was intended to be a mortgage. The sixth is substantially to the same effect—that, if there was no obligation on the part of the plaintiff in error to repay the money, the transaction should be regarded as a sale, and not a mortgage. The third and fourth have reference to some alleged inadequacy of price; and lay down the rule that mere inadequacy of price, if such there was, is not of itself sufficient to warrant the conclusion that the transaction was a mortgage. The fifth places upon the plaintiff in error the burden of proof to show that the transaction was a mortgage. The seventh, which is most unquestionably beyond the reach of reasonable exception, leaves it to the jury to determine whether a conditional sale or a mortgage was intended, and if the former, their verdict should be for the defendants in error. Equally unexceptionable is the second instruction, which simply instructs the jury that, if their verdict should be for the de-

fendants in error for the possession of the property, they should also allow for intervening rent. No defense of any of these propositions of law, as applicable to this case, would seem to be necessary. But a remark may be proper in regard to a suggestion of inadequacy of price which is referred to in some of them as having been raised by the testimony.

The plaintiff in error introduced some testimony to show that the property was greatly more valuable than the amount of the consideration mentioned in the deed executed by him to the defendants in error (Rec., pp. 17, 19, 20). But this testimony does not enter into any bill of exceptions, and is not certified in any way by the court or the judge so as to bring it in review by this Court. Nor does it even purport to be all the testimony in the case, or all the testimony upon this particular point. But even supposing that it was in proper shape to be considered by this Court, we respectfully submit that it is not sufficient to affect the merits of this controversy. Part of this property was mining property, imperfectly developed, notoriously of uncertain and fluctuating value; and all of it was of more or less speculative value. Moreover, a man may sell his property at a sacrifice; he may sell it for one-half its real value; he may give it away; and if the security of titles must depend in all cases upon the adequacy of the prices paid for them, no man would be secure in his possessions. Inadequacy of price, therefore, as laid down in the fourth instruction given to the jury on behalf of the defendants in error, is a circumstance to be considered with other facts, but not of itself sufficient to warrant the construction of an absolute deed as a mortgage. Assuredly, this is correct.

But another consideration upon this point, if the point is

to be considered at all, is the fact that, by the lease to him from the defendants in error at a merely nominal rental (Rec., p. 10), the plaintiff in error was entitled to make all he could and to extract all the ore that he could for his own use and benefit for the year of the lease; and we are nowhere told how much he did extract, or what benefit he did derive from the property, during this year. It might, in fact, have been all that the mines were ever worth, or ever have been worth. In the absence of any evidence upon this point, the question of inadequacy of price is scarcely a question to be considered at all.

4.

The refusal of three of the twelve instructions requested by the plaintiff in error (Rec., pp. 32, 33) is also included as error in bill of exceptions No. 1. But even a cursory perusal of these instructions will demonstrate the entire propriety of the action of the court in the premises.

The first assumes, in direct antagonism to the decisions of this Court heretofore cited, and in antagonism to the overwhelming mass of authority on the subject, that a deed absolute on its face and a simultaneous agreement to reconvey for a stipulated price on a specified day are to be construed as a mortgage.

The second instruction requests that the jury should be told, that if they believed from the evidence that the plaintiff in error executed the lease in evidence in the case by the deceit, misrepresentation, trick, or fraud of the defendants in error, or even under an innocent mistake or misapprehension as to the facts, they should hold the lease void and find for the plaintiff in error. The latter part of this in-

struction is not law: and this of itself would vitiate the whole of it. But the plain answer to the whole instruction is that, neither in the pleadings, nor in the testimony, nor anywhere else in the record, is there any allegation of fraud, deceit, misrepresentation, trick, innocent mistake, or misapprehension, or any attempt or pretense whatever to prove any of these things. And therefore the attempt to introduce them for the first time into a request for instructions to the jury, is extremely reprehensible, and justly received the reprobation of the court.

The third of the three instructions in question is to the effect, so far as can be gathered from its peculiar grammatical construction, that, if the jury have any doubt as to the character of the transaction, they should construe it to be a mortgage. This is so palpably wrong that it needs no comment whatever.

5.

The second assignment of error need only be very briefly noticed. It relates to the admission of certain conversations alleged to have been had between the parties at the time of the execution of the papers already mentioned. (Rec., p. 26.)

The testimony in reference to these conversations was testimony in rebuttal. It was intended simply to controvert similar testimony adduced on behalf of the plaintiff in error (Rec., pp. 23, 24). Now, it would be very extraordinary that the plaintiff in error should be allowed to show by oral testimony as to contemporaneous circumstances that a deed absolute on its face was a mortgage, and yet the de-

fendants in error should not be allowed to controvert such testimony.

But this matter is not a proper subject for review in this Court. It is not brought here by any bill of exceptions. It is not included in any bill of exceptions. It is not certified to in any manner by the trial court. It is contained in the so-called "Statement on appeal," with which we respectfully submit this Court has nothing to do.

6.

It is submitted that the case was most fairly and honestly tried, and that there is nothing whatever in the record to justify a reversal of the judgment of the territorial court.

M. F. Morris,
W. W. Dixon,
For Defendants in Error.